

THE  
**HAMLIN**  
LECTURES

Thirty-sixth series

**The Development  
of Consumer Law  
and Policy—Bold  
Spirits and  
Timorous Souls**

Sir Gordon Borrie



STEVENS

# The Development of Consumer Law and Policy—Bold Spirits and Timorous Souls

by

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The 36th series of *Hamlyn Lectures* were delivered by Sir Gordon Borrie, the Director General of Fair Trading, in May 1984. In this book, based on the text of the lectures, Sir Gordon takes as his subject the growth of consumer law in recent decades and analyses the different contributions made by the Courts and by Parliament to its development. He goes on to consider how and why policy-makers have chosen to proceed sometimes by way of changes in the criminal law and sometimes by changes in the civil law, and examines the administrative controls which have been created to underpin changing rules of law.

Topics include:

- The role of civil law—common law and statute: the *Supply of Goods (Implied Terms) Act 1973*, the *Unfair Contract Terms Act 1977*, and the *Supply of Goods and Services Act 1982*—the varying level of activity of the courts in the field of consumer protection.
- The role of criminal law: the *Trade Descriptions Act 1968*—problems of strict liability offences—the adequacy of penalties.
- Administrative regulation: the *Fair Trading Act 1973*—the development of codes of practice—licensing under the *Consumer Credit Act 1974*—positive and negative licensing schemes.
- Consumers and the European Community: has Britain's entry led to benefits to British consumers?—has the community's programme for consumer protection achieved its objectives?

This lively, thought-provoking study will be welcomed by all those involved in the field of consumer protection and information, whether as legislators, administrators, teachers, students, practitioners, or simply consumers.

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STEVENS





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LAW AND POLICY—  
BOLD SPIRITS AND TIMOROUS SOULS

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Sir Gordon Borrie  
1984

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THE Hamlyn Trust came into existence under the will of the late Miss Emma Warburton Hamlyn, of Torquay, who died in 1941 at the age of eighty. She came of an old and well-known Devon family. Her father, William Bussell Hamlyn, practised in Torquay as a solicitor for many years. She was a woman of strong character, intelligent and cultured, well versed in literature, music and art, and a lover of her country. She inherited a taste for law and studied the subject. She also travelled frequently to the Continent and about the Mediterranean, and gathered impressions of comparative jurisprudence and ethnology.

Miss Hamlyn bequeathed the residue of her estate in terms which were thought vague. The matter was taken to the Chancery Division of the High Court, which on November 29, 1948, approved a Scheme for the administration of the Trust. Paragraph 3 of the Scheme is as follows:

“The object of the charity is the furtherance by lectures or otherwise among the Common People of the United Kingdom of Great Britain and Northern Ireland of the knowledge of the Comparative Jurisprudence and the Ethnology of the chief European countries including the United Kingdom, and the circumstances of the growth of such jurisprudence to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples and realising and appreciating such privileges may recognise the responsibilities and obligations attaching to them.”

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The Thirty-sixth series of Hamlyn Lectures was delivered at the London School of Economics and Political Science (University of London) in May 1984 by Sir Gordon Borrie.

AUBREY L. DIAMOND

*Chairman of the Trustees*

*May 1984*

## *I. Introduction*

It is now some 30 years since Lord Denning, shortly after giving the very first of the Hamlyn Lectures,<sup>1</sup> divided his fellow judges into two categories: the “timorous souls who were fearful of allowing a new cause of action” and “the bold spirits who were ready to allow it if justice so required.”<sup>2</sup> He left no doubt as to which category he put himself in and throughout many diverse areas of law—administrative law, family law, the law of negligence—it is not difficult to substantiate the essential truth of Lord Denning’s observation. Of course, like many generalisations about people, it is inexact and perhaps unfair but, in looking back at the development of the case law of a particular subject, it is not difficult to identify at least some of the bold spirits and the timorous souls and to see when the former were in the ascendancy and when the latter.

A thesis that I will advance in these lectures is that, in the development of consumer law and policy, statute law has had a larger part to play than case law. This is partly

<sup>1</sup> Denning, *Freedom under the Law* (Hamlyn Lectures, 1949).

<sup>2</sup> *Candler v. Crane, Christmas & Co.* [1951] 2 K.B. 164, 178; [1951] 1 All E.R. 426, 432.

due to the fact that, at a key period in recent history, the timorous souls were in the ascendancy over the bold spirits among the judges. But progress by statute law also comes in cycles because Ministers, Parliament and members of Government committees and commissions who provide the raw material for legislative action may also comprise both timorous souls and bold spirits. In the 1960s and early 1970s, although the bold spirits were not in the ascendancy among the judges, they were in the ascendancy elsewhere as eager advocates and proponents of significant change. Lord Hailsham said in his Hamlyn Lectures last year:<sup>3</sup>

“English law has not progressed at a regular speed throughout its history. It has had its creative periods, and its periods of quiescence and consolidation. In part, its creativity has been due to bold strokes of imagination by creative and original judges. . . . In part it has been due to external forces like the original thinking of Jeremy Bentham or the social and political activity of Parliament.”

Like many other countries in Europe, North America and elsewhere, the 1960s were the beginning of a period of substantial development in Britain in the field of consumer protection. With the aim of seeking to redress the natural imbalance of power between the ordinary person and the business provider of goods and services and trying to prevent the worst kinds of trading abuses, Governments of different political colours sought to alter both the civil law and the criminal law and to create new institutions and procedures to ensure that the changes were

<sup>3</sup> Hailsham, *Hamlyn Revisited: The British Legal System Today* (Hamlyn Lectures, 1983), p. 36.

made effective. Valuable source material for the kind of changes that seemed to be needed was to be found in the report in 1962 of a committee usually known as the Molony Committee,<sup>4</sup> after its chairman the late Sir Joseph Molony Q.C., which reviewed the law relating to safety standards, labelling, advertising, civil redress and other aspects of consumer protection. Another Government Committee Report, dealing with the subject of Consumer Credit,<sup>5</sup> published in 1971, and a number of proposals of the English and Scottish Law Commissions (both created in 1965) were also to a large extent implemented by Government and Parliament.<sup>6</sup> The development of consumer law was very much a period of advance by statute rather than case law, and more by way of criminal law and administrative controls than through civil law.

But I do not in any way dismiss the common law. In the words of the Scheme approved by the Chancery Division in 1948, a Hamlyn Lecturer must help “the common people of the United Kingdom” to realise “the privileges which in law and custom they enjoy” and, historically, a high proportion of our law and custom has been consti-

<sup>4</sup> Final Report of the Committee on Consumer Protection, 1962 (Cmnd. 1781).

<sup>5</sup> Report of the Commission on Consumer Credit (Chairman: Lord Crowther), 1971 (Cmnd. 4596).

<sup>6</sup> First Report on Exemption Clauses in Contracts, 1969 (Law Com. No. 24 and Scot. Law Com. No. 12), implemented by the Supply of Goods (Implied Terms) Act 1973; Second Report on Exemption Clauses, 1975 (Law Com. No. 69 and Scot. Law Com. No. 39), implemented by the Unfair Contract Terms Act 1977; Report on Implied Terms in Contracts for the Supply of Goods, 1979 (Law Com. No. 95), implemented by the Supply of Goods and Services Act 1982. The Report on Liability for Defective Products, 1977 (Law Com. No. 82 and Scot. Law Com. No. 45) has not been implemented; the Report on Insurance Law: Non-Disclosure and Breach of Warranty, 1980 (Law Com. No. 104, Cmnd. 8064) is expected to be implemented shortly.

tuted by the common law. But, quite apart from our historical debt to the common law, although in more recent times the common law has often seemed to “run out of steam”<sup>7</sup> and to make only a small contribution to the development of the law, it is always there, biding its time, as it were, ready to contribute once more when the time is ripe. Recent statute law in the cause of consumer protection has been of great importance but it does not replace common law. Indeed, Acts of Parliament may help to save the common law and to revive its significance by giving it a new sense of direction, a new steer, when it seemed to be inadequate or bogged down in a sea of precedents and a plethora of over-subtle distinctions. I believe this was the case with the Occupiers’ Liability Act 1957 and, if given the chance, it may be the case with the Unfair Contract Terms Act 1977. Those Acts got rid of some dead wood but they did not kill off the common law. They set a new direction and gave the courts a new task in interpretation and a new opportunity to develop the law as changing circumstances require. As Professor Cappelletti has shown, in his comparative studies of legislation, the judicial role can actually be increased by legislation.<sup>8</sup> And, as Lord Hailsham said in his Hamlyn Lectures last year, “laws intended to protect the weak against the

<sup>7</sup> Hailsham, *op cit.* p. 36.

<sup>8</sup> Mauro Cappelletti, “Some Thoughts on Judicial Law-Making,” published in *Festschrift für Imre Zajtay* (1982), p. 98. “With legislatures and administrative agencies so busily writing detailed codes to regulate even broader aspects of our lives, one might expect that little law-making room would be left to judges. I submit that precisely the opposite is true: that in our era of increased legislative and administrative law-making, the level of judicial law-making has increased, rather than declined. And it has increased—not *in spite* of legislative and administrative activity, but *because* of it.”

strong in cases where their vulnerable position makes them the weaker party in negotiation can well be given a liberal interpretation. . . . ”<sup>9</sup>

I want to survey in these lectures not only the development of consumer law and the parts that have been played and will be played by the courts and by Parliament but how and why the policy makers have chosen to proceed by way of changes in the criminal law rather than the civil law (or vice versa) and why administrative controls, such as licensing under the Consumer Credit Act, have been created to underpin rules of law. The role of the criminal law in the field of trading activities and the function of regulatory authorities are of course controversial matters on which policy continues to develop.

<sup>9</sup> Hailsham, *op cit.* p. 67.



## *II. The Role of Civil Law: Common Law and Statute Law*

During the main period of advance in consumer protection in the 1960s and 1970s, the common law did not contribute very much. Yet the foundations of consumer protection, the laying of a firm basis of obligations owed by traders to their customers, had been put down by the courts of earlier times. And there are some signs now once more in the 1980s that the courts are again showing their muscle. In the past certainly, judges contributed a great deal, specifying, for example, the basic obligations on the trader who sold goods—that they must be of merchantable quality and reasonably fit for their purpose, and the basic obligation on traders who provided services that they must carry out their work in a proper and workmanlike manner. But, as is well known, traders frequently sought to exempt themselves from these basic obligations by appropriate clauses in their contracts and the courts, in the name of “freedom of contract,” allowed such exemption clauses to be effective even when, as in the trader-consumer relationship, there is typically an imbalance of bargaining power. The common law seemed unable to cope adequately with the problem. As Lord Devlin put it:

“The courts could not relieve in cases of hardship and oppression because the basic principle of freedom of contract included freedom to oppress.”<sup>1</sup> Lord Denning, it is true, sought to combat exemption clauses in every way he could. It has been said that he “carried on a war of attrition against them” but this only “led to a good deal of unedifying judicial conflict with the result that the image of the common law became further tarnished.”<sup>2</sup> The courts did rule that “reasonable” notice of exemption clauses must be given but a series of cases, generally known as the “ticket cases,” ruled as sufficient a mere reference to the existence of terms that were only set out in another document not shown to the customer. Any ambiguity in the wording of an exemption clause was construed against the trader but more skill, especially on the part of the legal advisers of trade associations, overcame that requirement. The courts did rule that if a trader was in *fundamental* breach of a contract he may not be able to rely on an exemption clause but, as Lord Reid pointed out in the leading case of *Suisse Atlantique*<sup>3</sup> in 1966, the common law doctrine of fundamental breach was incapable of distinguishing between the case where parties bargained on terms of equality and the case where no such equality existed. He called upon Parliament to provide a solution.

The last really major contribution of the common law to consumer protection was the landmark case about the

<sup>1</sup> Devlin, “The Common Law, Public Policy and the Executive” Presidential Address to the Bentham Club ([1956] *Current Legal Problems*, p. 10).

<sup>2</sup> Prof. H.K. Lücke of the University of Adelaide (1982) 98 L.Q.R. 29, 84.

<sup>3</sup> *Suisse Atlantique Société d'Armement Maritime S.A. v. N.V. Rotterdamsche Kolen Centrale* [1967] 1 A.C. 361, 406; [1966] 2 All E.R. 61, 76.

snail in a bottle of lemonade: *Donoghue v. Stevenson*<sup>4</sup> decided by the House of Lords on appeal from Scotland in 1932. By a three to two majority it was decided that a manufacturer can be made liable in damages for the tort of negligence to anyone who is killed or injured or whose property is damaged by a defective product, if it is established that there was lack of care on the part of the manufacturer or his employees. That was a decision that spawned a series of judgments establishing a duty of care to the consumer on the part of manufacturers of many different types of goods: hair-dye, underpants, cars, elevators and many others, and the duty of care has been extended from manufacturers to cover repairers, assemblers and retail dealers.

In the 1970s there was, I think, only one item of consumer protection on which the common law made a creative impact: the measure of damages. The courts seem now to be willing to allow damages for tort or for breach of contract not only in respect of physical injury or damage and financial loss but also for distress and disappointment. In a case that went to the Court of Appeal in 1973<sup>5</sup> an English solicitor booked a holiday in Switzerland on the basis of a brochure which promised a welcome party on arrival, afternoon tea and cakes, a bar which would open several evenings a week and a charming owner who spoke English. There was no welcome party. The solicitor did not have the nice Swiss cakes he was hoping for: for tea there were only potato crisps and little dry nutcakes. The bar was an unoccupied annexe open only

<sup>4</sup> [1932] A.C. 562.

<sup>5</sup> *Jarvis v. Swans Tours Ltd.* [1973] 1 Q.B. 233; [1973] 1 All E.R. 71. See also *Jackson v. Horizon Holidays Ltd.* [1975] 1 W.L.R. 1468; [1975] 3 All E.R. 92, C.A.

one evening a week, and the Swiss owner could not speak English. The Court of Appeal said the solicitor was entitled to be compensated for disappointment and distress and he was awarded twice the cost of the holiday as damages.

The inadequacy of the common law response to exemption clauses has now been modified by statutory rules proposed by the Law Commission after lengthy study and review. They are embodied in the Supply of Goods (Implied Terms) Act 1973, the Unfair Contract Terms Act 1977 and the Supply of Goods and Services Act 1982. Lord Reid's call for a parliamentary solution has been answered. There is no doubt that these Acts have made a major contribution to consumer protection, especially where they lay down clear rules that in certain circumstances exemption clauses are void. Thus, it is now the law that as against a person "dealing as a consumer," the liability for breach of the seller's basic obligations arising from what is now the Sale of Goods Act 1979 to supply goods in conformity with their description and goods which are of merchantable quality and reasonably fit for their purpose, cannot be excluded or restricted by reference to any contract term. But the goods must be "of a type ordinarily supplied for private use or consumption" and the buyer must not buy "in the course of a business." The same rule applies to hire-purchase,<sup>6</sup> contracts of hire and those complex contracts where goods are bought along with services, known as contracts for work and materials.<sup>7</sup> A manufacturer's negligence liability for loss or damage cannot be excluded by any contract term or notice contained in a manufacturer's guarantee, provided the goods are "of

<sup>6</sup> Unfair Contract Terms Act 1977, s.6(2) and s.12(1).

<sup>7</sup> Unfair Contract Terms Act 1977, s.7(2) and s.12(1).

a type ordinarily supplied for private use or consumption.”<sup>8</sup> And, nobody who provides services, like furniture removers, owners of ferries and car parks, tour operators and repairers may, by reference to any contract term or to a notice, exclude or restrict his liability for death or injury resulting from negligence.<sup>9</sup>

However, except in the clearest of cases, the dearth of judicial precedent, which may well persist over a long period of time, leaves a great deal of uncertainty as to the application of the new statutes. A number of questions are left unanswered by the statutory provisions which make void any contractual term seeking to exclude or restrict a supplier’s liability to someone who deals “as a consumer.” If a newsagent buys an electric fire for his shop, is he buying “as a consumer”? There is authority for saying “yes” because the transaction does not form an integral part of the buyer’s business nor is it necessarily incidental thereto.<sup>10</sup> Yet the decision must be a doubtful one bearing in mind that the newsagent seems to be buying “in the course of a business.” If a private person buys elaborate building equipment, he is probably not buying as a consumer but when many people nowadays do their own building or decorating work, factual evidence may be required to determine whether the goods are “of a type ordinarily supplied for private use or consumption” and where the line is to be drawn. It is certainly of some help that the onus of proof is on the seller to prove that the buyer does *not* deal as a consumer.<sup>11</sup>

<sup>8</sup> Unfair Contract Terms Act 1977, s.5.

<sup>9</sup> Unfair Contract Terms Act 1977, s.2(1).

<sup>10</sup> *Peter Symmons & Co. v. Cook*, High Court, March 1981, unreported. But see (1981) 131 New L.J. 758. See also Atiyah, *The Sale of Goods* (6th ed., 1980), p. 161.

<sup>11</sup> Unfair Contract Terms Act 1977, s.12(3).

In contracts for services there is the more considerable uncertainty that, except where the claim is in respect of death or personal injury, an exemption clause is not void. For all other kinds of loss or damage, the Unfair Contract Terms Act specifies merely that a person cannot so exclude or restrict his liability except in so far as the term or notice satisfies the requirement of reasonableness.<sup>12</sup> The question to be answered is whether the term was a fair and reasonable one to be included in the contract having regard to the circumstances which were, or ought reasonably to have been, in the contemplation of the parties when the contract was made. Unlike the provisions relating to supply of goods contracts, the reasonableness test is applied to contracts with private consumers and others alike and there are no guidelines set out in the Act to assist the courts except where it is sought to restrict liability to a specified sum of money. (The guidelines that are set out in the Act as applicable to supply of goods contracts may, however, be applied by analogy by the courts to supply of services contracts.)

The effect of the Act therefore on, for example, a term in a contract for repairing a watch or for the carriage of goods which excludes or limits any liability on the provider of the service for breach of contract or for negligence remains unclear. It is true that the burden of proof is on the provider of the service to show that an exemption clause satisfies the test of reasonableness<sup>13</sup> but, unless traders voluntarily give up the use of such clauses, uncertainty will continue as to whether certain terms are enforceable or whether they could be challenged as unreasonable and that uncertainty may persist because

<sup>12</sup> Unfair Contract Terms Act 1977, s.2(2) and s.11.

<sup>13</sup> Unfair Contract Terms Act 1977, s.11(5).

few people will wish to incur the risk and expense of taking their challenge to the courts and obtaining a ruling that could stand as a precedent for the future. The courts have been given an important role in the development of the law but are they being given enough opportunity to exercise it?

The few cases that have come to court in the six years since the Act came into effect have been heard mainly in the county courts. But it is interesting that some consumers are prepared to challenge an exemption clause under the Act and the Consumers' Association magazine *Which?* publicised one such case in its March 1981 issue. A man put his car through an automatic car wash. The brushes whirred round but there was no water. When the car emerged, he noticed that the brushes had caused extensive scratching to the paintwork. A disclaimer notice displayed at the entry to the car wash stated that the garage would not be responsible for any damage. The county court registrar decided that the notice was not fair and reasonable and awarded the car owner his repair costs, the court fee and travelling expenses to and from the court.

According to Dr. Richard Lawson, who is an assiduous collector of cases decided under the Unfair Contract Terms Act, *some* clarification as to how the courts will apply the reasonableness test is beginning to emerge from the case law.<sup>14</sup> The trend in consumer cases, he says, is that there will be considerable difficulty in overcoming the presumption that a clause under challenge is not a reasonable one. I think that view is right, not because of any precedent established by the courts in a consumer case decided under the Unfair Contract Terms Act, but because

<sup>14</sup> Lawson, "Exclusion Clauses and the Test of Reasonableness" [1982] L.S.Gaz. 1114.

consumer cases are really the obverse of a case considered by the House of Lords concerning a contract made before the Act between two businesses. This is the case of *Photo Production Ltd. v. Securicor Transport Ltd.*<sup>15</sup> where Lord Diplock said:

“In commercial contracts negotiated between businessmen capable of looking after their own interests and of deciding how risks inherent in the performance of various kinds of contract can be most economically borne (generally by insurance), it is, in my view, wrong to place a strained construction on words in an exclusion clause which are clear and fairly susceptible of one meaning only. . . .”

Although there is no precedent value in a county court judgment, I believe that traders making contracts with consumers for the provision of services can find some guidance in a case decided in the Exeter County Court in 1981, *Woodman v. Photo Trade Processing Ltd.*<sup>16</sup> A film of wedding photographs was taken to a processor for developing and most of the negatives were lost. The processor sought to rely on a clause in the contract limiting liability to the cost of replacement of the film. In considering whether that clause was reasonable the judge paid some attention to the code of practice negotiated between the photographic industry and the Office of Fair Trading. The code envisages the possibility of a “two-tier service,” *i.e.* a service at normal charges with restricted liability and a service at higher charges with full liability, and the judge considered that some such form of two-tier system was not only reasonable but practicable. The processor had not

<sup>15</sup> [1980] A.C. 827, 851; [1980] 1 All E.R. 556, 568.

<sup>16</sup> Exeter County Court, Judge P.H.F. Clarke, May 7, 1981, unreported.

offered any such alternatives and for this and other reasons the restriction of liability clause was held to be unreasonable.

It is hardly surprising that so little has emerged in the way of interpretative case law since the Unfair Contract Terms Act became law six years ago. Dr. Lawson may be right that consumers who wish to challenge exemption clauses as being unreasonable have a good chance of succeeding. Traders who are challenged may in any case prefer to settle rather than risk the adverse publicity of a county court hearing, let alone the precedent effect of a High Court case. But the reasonableness test combined with the continuing absence of case law on the meaning of "reasonableness" is bound to leave consumers and their advisers in a limbo of some uncertainty. The Law Commission in its 1975 Report<sup>17</sup> rejected any system of prior validation of standard contract forms but it is interesting that in Australia there are recent examples of State officials being empowered to take the initiative to seeking a court ruling on "unjust" contracts. The Contracts Review Act 1980 of New South Wales is to some extent modelled on our Unfair Contract Terms Act but provides not only for judicial review of certain contracts at the instance of consumers but also for an initiative by officials by way of application to the court to give a ruling on "unjust" contracts, which are broadly defined as to "include unconscionable, harsh or oppressive contracts."<sup>18</sup> Section 10 of the Act contains an especially interesting provision under which the Minister or the Attorney-General may apply to the court where a person

<sup>17</sup> Second Report on Exemption Clauses, 1975 (Law Com. No. 69 and Scot. Law Com. No. 39), paras. 290-314.

<sup>18</sup> Contracts Review Act 1980, s.4(1).

has embarked or is likely to embark on a course of conduct leading to the formation of “unjust” contracts, to prescribe or otherwise restrict the terms on which that person may enter into contracts of a specified class. This is potentially a very useful preventive procedure to ensure the fairness of the terms of typical consumer contracts. It would seem to be more flexible than the requirements of the better known Israeli Standard Contracts Law 1964 with its requirement for the prior validation of standard form contracts.

In Sweden, the Consumer Ombudsman may seek a prohibitory injunction in the Market Court in respect of any contract clause that is “unreasonable towards the consumer” so that a trader may not use that term or a term which is substantially the same in similar cases in future. Professor Bernitz describes the purpose of this provision of the Terms of Contract Act 1971 as “inherently preventive . . . to protect consumers as a group by setting standards for the conduct of business in the marketplace.”<sup>19</sup>

There are no precisely similar powers in this country but the Restrictive Trade Practices legislation and the promulgation of codes of practice under section 124 of the Fair Trading Act 1973 have been of some use in promoting fairer terms of contract.

Recommendations by trade associations of standard form contracts for use by members have to be registered with the Office of Fair Trading and, as a general rule, have to be referred to the Restrictive Practices Court to determine whether they may be allowed to be effective as being

<sup>19</sup> Ulf Bernitz and John Draper, *Consumer Protection in Sweden: Legislation, Institutions and Practice* (Institute of Intellectual Property and Market Law, Stockholm University), p. 210.

not contrary to the public interest.<sup>20</sup> However, if the Director General of Fair Trading considers the restrictions are “not of such significance as to call for investigation by the Court,” he may make representations to the Secretary of State for Trade and Industry who may then give directions relieving the Director General from his duty to take the agreement to court.<sup>21</sup> Where restrictions take the form of requirements or recommendations to use a standard form of contract there is scope for discussion between the Office of Fair Trading and the trade association as to the details of the standard form contract so as to ensure that the terms are fair to both parties, are not likely to mislead those who will use them and do not unnecessarily exclude variation to meet special circumstances and requirements.<sup>22</sup> Since the Unfair Contract Terms Act, we have of course insisted on the removal of terms that are void under that Act and have asked associations to justify terms that are subject to the reasonableness test under that Act. The benefit to customers of having standard conditions must also be balanced against the detriment to them of being deprived of the freedom to secure more favourable terms.

For the most part standard contract terms apply to transactions between traders but there are certain fields where they do or could apply to consumer transactions, *e.g.* central heating installation, plumbing, electrical work, building repair and maintenance, sale and repair of vehicles; sale, repair and mooring of boats; removals; and commercial services such as photography. In these cases my Office

<sup>20</sup> Restrictive Trade Practices Act 1976, ss. 1,2,8,10,16 and 19.

<sup>21</sup> Restrictive Trade Practices Act 1976, s.21(2).

<sup>22</sup> See the Report of the Registrar of Restrictive Trading Agreements 1966–1969 (Cmnd. 4303), pp. 5–6.

has an opportunity to seek amendments to ensure that terms as to liability, guarantee of workmanship, cancellation of contract etc are fair and reasonable.

Section 124 of the Fair Trading Act requires the Director General of Fair Trading to encourage trade associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers. Since 1973, 20 codes have been launched, covering a wide variety of industries—electrical servicing, shoes, the motor industry and travel are among them. One important aspect of several codes of practice is that certain types of contractual terms that have given rise to consumer complaint in the past are banned and other terms are required to be inserted in contracts. The codes therefore help to rewrite standard form contracts so that they are less one-sided than before.

For example, in the code agreed with the Association of British Travel Agents, all booking conditions must conform to the relevant provisions of the code and among the provisions is the following:

“Booking conditions shall not include clauses . . . purporting to exclude or limit responsibility for the tour operator’s contractual duty to exercise diligence in making arrangements for his clients or for consequential loss following from breach of his duty.”

Clearly, if a tour operator adheres to the code and therefore does not seek to avoid his contractual obligation to exercise diligence, no problems will arise under the Unfair Contract Terms Act—the administrative control of the code gives greater protection than the Act and the uncertainty of there being an exemption clause that might be upheld by the courts as reasonable is avoided.

In the 1981 code of the Glass and Glazing Federation,

the unilateral right of cancellation given to consumers under the Hire Purchase Acts and the Consumer Credit Act in respect of agreements signed at home is extended to cash customers. This is of course intended as a further deterrent to the persuasive foot-in-the-door salesman who seeks an immediate binding commitment on the part of the householder. The code also enhances the customer's common law right to make time of the essence of the contract by way of provisions in the contract specifying a completion date and saying that, if work is not completed by that date, the householder may serve notice requiring that work to be completed within six weeks. The contract term must explain that if the work is not completed within such extended period, the householder may cancel the uncompleted work covered by the contract without penalty to himself by the service of a written notice to that effect on the supplier.

There are no specific powers in the Fair Trading Act to promote codes of practice by public corporations and the terms on which they do business are not those recommended by any trade association so are not registrable under the Restrictive Trade Practices Act. It took four years of patient negotiation with the Board of British Rail on the part of the Central Transport Users' National Council and the Office of Fair Trading before British Rail were prepared to alter and update the conditions on which they carry passengers and their luggage. It did sometimes occur to me in the years between 1978 and 1982 that my opposite numbers in Australia and Sweden may have secured speedier changes for the benefit of the public by being able to seek a judicial ruling as to what was fair and reasonable and thereby enable the judges to exercise the creative role that our Unfair Contract Terms gives them

only at the behest of private individuals and traders. And of course the possibility in those countries of seeking a judicial ruling on unfair or unjust contracts goes much wider than merely exemption clauses in contracts. The title of our Unfair Contract Terms Act is a misnomer. It does not deal with unfair contract terms generally but almost only with terms purporting to exclude or limit liability for breach. But there are other types of unfair contract terms—unfair cancellation clauses in travel contracts, terms specifying that no contract, *e.g.* for a sea cruise, comes into existence until full payment is made, compulsory arbitration clauses, and unfair conditions on which contractual rights may be exercised. If you buy a ticket for travel by British Rail and fail to make the journey, your right (or should I say concession?) to a refund is subject to a condition that you make the claim within seven days. And, as the Law Commission itself recognised,<sup>23</sup> it may be possible to evade the application of the “reasonableness” test for exemption clauses by drafting the contract in “positive and limited form” thereby delimiting the scope of the obligation, instead of by continuing to express the obligation in general terms and limiting its scope by specific exceptions. It is the impression of one writer that instructions as to the use of consumer goods have become increasingly popular with suppliers since the advent of the Unfair Contract Terms Act and that such instructions can cut down the content of the obligations on the trader that are implied by the Sale of Goods Act.<sup>24</sup>

Persuasion, albeit over a longish period, can achieve

<sup>23</sup> Second Report on Exemption Clauses, 1975 (Law Com. No. 69 and Scot. Law Com. No. 39), para. 138.

<sup>24</sup> Professor J.K. Macleod, “Instructions as to the Use of Consumer Goods” (1981) 97 L.Q.R. 550, 558–560.

something. In 1982, British Rail announced that it could no longer attempt to avoid liability for the consequences of error or negligence of their staff in cases of damage to lost property or left luggage, damage or injury to animals, bicycles, prams, etc., carried at extra charge, and passengers being misdirected by staff. The limit on liability for passengers' luggage was raised from £100 to £500 per passenger and the time limit after which unclaimed left luggage can be sold by British Rail was extended from one month to three months.

Persuasion also seemed a worth while weapon to wield when, five years after the coming into law of the Unfair Contract Terms Act, various companies and public bodies appeared still to be using contract terms rendered void by that Act. In 1983, the Lions of Longleat Wildlife Park still exhibited a notice denying "any liability whatsoever for loss of life or personal injury to any person . . . caused by the negligence, breach of statutory duty or any act or default whatsoever of the company, its servants or agents." The British Airports Authority had a similar notice in respect of the spectator enclosure at Gatwick Airport. Car hire firms said they would accept no responsibility for loss, damage or delay due to mechanical or other defects in the vehicles they supplied. I do not know if these various bodies continued to use void terms because they were unaware of the law or because of advice they received from their insurance companies or because they wanted deliberately to mislead the public, hoping that many would be deterred from seeking redress by phrases which appear to be a legally-based denial of their rights. But I am glad to say that request letters from the Office of Fair Trading plus some media publicity has helped to persuade or shame many traders and public

authorities into removing void terms from contracts and notices.

I said earlier that in the 1970s there was probably only one item of consumer protection on which the common law made a creative impact: the measure of damages. Statute was the pre-eminent source of new law. The signs so far in the 1980s are in the opposite direction. The Supply of Goods and Services Act 1982 was a helpful clarification of the basic obligations of suppliers of goods in non-sale contracts and of suppliers of services. But it did not create any new rights and the provision in section 13 that the supplier of a service will carry out the service with reasonable care and skill is much less demanding than the requirement, such as exists in Australian law,<sup>25</sup> that the supplier's services or his product will be reasonably adequate for their intended purpose or will achieve a certain result. The Court of Appeal, unfortunately only in an unreported decision, did imply such a term in a decision in 1980.<sup>26</sup>

The most obvious gap in consumer rights—the right to claim against a manufacturer in respect of death or injury resulting from defective products without having to prove fault—has been left unfilled by statute. Such a right had been advocated by the Law Commissions and by the Royal Commission on Personal Injury Litigation under Lord Pearson's chairmanship in reports published in 1977 and 1978<sup>27</sup> and there were initiatives at the level of the EEC and of the Council of Europe to establish a so-called

<sup>25</sup> Trade Practices Act 1974 (Australia), s.74(2).

<sup>26</sup> *G.K. Serigraphic Ltd. v. Dispro Ltd.*, December 15, 1980. See N.E. Palmer, (1983) 46 M.L.R. 619, 629.

<sup>27</sup> Report on Liability for Defective Products, 1977 (Law Com. No. 82 and Scot. Law Com. No. 45); Report of the Royal Commission on Civil Liability and Compensation for Personal Injury, 1978 (Cmnd. 7504).

“strict” liability on manufacturers. They were all in broad agreement that it is illogical and unfair that, if a man is injured through a defect in an electrical gadget that he has bought, the retailer is liable to him for breach of contract irrespective of fault, but if he gives the gadget to his wife to use or hands it over to a friend as a gift, they have no claim against anyone in respect of injuries caused by the gadget unless negligence is established. They were all in broad agreement that the manufacturer is in the best position to arrange insurance cover for the consequences of his products being defective and strict liability would ensure that all consumers make some contribution to ameliorate the sufferings of the few that arise from the small number of items from an otherwise normal production run that are defective. These initiatives have however become bogged down in detailed disagreements between different countries. In the meantime the courts in Britain have taken the opportunity of extending the existing law on product liability so that, while the manufacturer’s liability to the ultimate consumer is still based on fault, fault may well be presumed by the court and the manufacturer’s liability may extend to economic or financial loss and not just to personal injury or damage to property.

What may be happening is that in a period of non-development of the law through legislation, the courts are once again asserting themselves in the traditional way through the fortuitous circumstances of particular cases emerging in litigation and perhaps being influenced by the sort of debate about product liability which crystallised in the work of the Law Commissions, the Royal Commission, the EEC and the Council of Europe, all of whom in their various ways favoured a development of manufacturer responsibility in law. The attitude of the courts has not

stood still over the years in which the EEC Commission's draft directive of 1975 has been taking the centre of the stage. It seems, for example, that the consumer who proves certain basic facts of injury or damage caused by a defect in the goods may win his claim unless the manufacturer can provide a satisfactory explanation showing that he was not at fault. In other words, the consumer may be assisted by the doctrine of *res ipsa loquitur*.

The duty of care on a manufacturer towards the ultimate consumer or user under present British law does seem to be quite a heavy one. A few years ago British Leyland (BL) was held liable by the High Court following an incident in April 1976 when a wheel came off a car manufactured by BL and caused serious injuries.<sup>28</sup> The car had been purchased as a new car in November 1974 and between that date and April 1976 the manufacturer acquired knowledge (not made generally available to the public) of wheels coming adrift. By 1975, some 104 cases of "wheels adrift" problems had been reported. The manufacturer was held to owe a duty to the public to *recall* cars so that safety washers could be fitted on the wheels and this had not been done, so the manufacturer was at fault. What the manufacturer had done was merely to warn dealers of the dangers of incorrect adjustment and urge them to fit larger washers when servicing cars. A revealing memorandum from a chief engineer at BL in September 1974 referred to the design defect as follows: "The design is not 'idiot proof' and will . . . continuously involve risk. . . . . Engineering have considered the

<sup>28</sup> *Walton v. British Leyland (U.K.) Ltd., Dutton Forshaw (North East) Ltd., and Blue House Lane Garage Ltd.*, July 12, 1978 (High Court, Queen's Bench Division, unreported), but see *Product Liability International*, August 1980, p. 156.

possibility of recall action but do not favour it owing to the fact that it would damage the product. . . .” Willis J., describing the manufacturer’s duty, said they should have made “a clean breast of the problem and recalled all cars which they could in order that the safety washers could be fitted.” “I accept,” he went on, “that manufacturers have to steer a course between alarming the public unnecessarily and so damaging the reputation of their products, and observing their duty of care towards those whom they are in a position to protect from dangers of which they and they alone are aware. . . . They seriously considered recall and made an estimate of the cost at a figure which seems to me to be in no way out of proportion to the risks involved. It was decided not to follow this course for commercial reasons. I think this involved a failure to observe their duty of care for the safety of the many who were bound to remain at risk. . . .”

Bearing in mind that under the EEC draft directive the consumer has the not inconsiderable burden of proving the defectiveness of the product and that injury or damage was caused by defect, implementation of the directive in Britain would not make such a drastic change in our law as is sometimes suggested. However, I must admit that there have been insufficient cases in our higher courts for anyone to be certain how far our law has already moved. The courts have shown some willingness to apply the doctrine of *res ipsa loquitur* but as long as the manufacturer’s direct liability to the ultimate consumer rests on proof of negligence, the consumer is in a more uncertain position and less likely, therefore, to risk pursuing a claim in the court than if the manufacturer were under a strict liability.

Yet the trend of recent court decisions is a trend towards judges being more ready to assume or more easily

convinced that defects are attributable to some fault on the part of the manufacturer. Another "traffic accident, with tragic consequences" (as Lord Diplock put it) was considered by the House of Lords in 1981 in the case of *Lambert v. Lewis*.<sup>29</sup> A trailer carrying rubble became detached from a Land Rover as the Land Rover was being driven by a farm worker. The trailer careered across the road and hit a car coming in the opposite direction. In it were Mr. and Mrs. Lambert, a son and a daughter. Mr. Lambert and the son were killed; Mrs. Lambert and the daughter suffered relatively minor injuries. The defendants in the case were the farmer who owned the trailer, the dealers who had sold the trailer coupling to the farmer and fitted it on the Land Rover and the manufacturers who manufactured the coupling. (The dealer had not bought direct from the manufacturers but from a wholesaler who could not be identified.) The trial judge found that the coupling was defective in design and dangerous in use on the highways and that the defects were readily foreseeable by an appropriately skilled engineer. He also found that part of the coupling had been missing and the farmer must have been aware of that fact. The judge apportioned the liability as to 75 per cent. to the manufacturer and 25 per cent. to the farmer. The judge and the House of Lords ruled that there was no liability on the dealer because the dealer's implied contractual warranty to the farmer that the coupling was fit for the purpose of towing trailers came to an end once the farmer became aware of its defect. However, the House of Lords did sound a warning that *if* a distributor is properly liable, *e.g.* for breach of contractual warranty to a purchaser in

<sup>29</sup> [1982] A.C. 225, 271; [1981] 1 All E.R. 1185, 1187.

respect of compensation that purchaser has to pay out to a stranger injured by a defect in the goods, the distributor may have a right to recover that economic loss from the manufacturer even if the distributor is not in direct contract with the manufacturer.

The House of Lords was not called upon to give a final view on the matter and made no comment at all on the view of the Court of Appeal in the same case that the manufacturer did not incur any liability to the distributor in respect of literature which he had issued claiming that the coupling was “foolproof” and required “no maintenance.” The Court of Appeal had said that such claims could not constitute contractual warranties and they could not regard “the manufacturer. . . . of an article as putting himself into a special relationship with every distributor who obtains his product and reads what he says or prints about it and so owing him a duty to take reasonable care to give him true information or good advice.”<sup>30</sup> My own view, bearing in mind the later House of Lords decision in *Junior Books Ltd. v. Veitchi Co. Ltd.*<sup>31</sup> to which I shall shortly refer, is that manufacturers may only have won a brief reprieve from the possibility of liability arising out of such promotional literature.

Apart from the hint of potential manufacturer liability for economic loss, the House of Lords decision in *Lambert v. Lewis* shows that even under the present law whereby the manufacturer is liable for death or injury caused by a defect in goods only if fault is established, that requirement may not in practice be a burdensome one and the essential task of the victim is simply to show that the

<sup>30</sup> [1982] A.C. 225, 264; [1980] 1 All E.R. 978, 1003, *per* Stephenson L.J.

<sup>31</sup> [1983] A.C. 520; [1982] 3 W.L.R. 477.

injury was caused by a defect in the goods. Clearly, in a case like *Lambert v. Lewis*, evidence is needed that the design is defective but, if that evidence is forthcoming, fault on the part of the manufacturer will be taken for granted, unless he can produce a satisfactory explanation. In a régime of strict liability, it is still necessary to establish both the defectiveness of the product (in the design or otherwise) and a link between that defectiveness and the injury. Under the present law, if the manufacturer is held liable for negligence, the conduct of those handling the product after it leaves the factory may reduce the manufacturer's liability because the manufacturer is entitled to a contribution from others liable in respect of the same damage. A strict liability régime, such as envisaged by the EEC draft directive, would give the manufacturer similar rights of recourse against others.

The potential liability of the manufacturer to the ultimate consumer of defective goods was extended by the decision of the House of Lords in *Junior Books Ltd. v. Veitchi Co. Ltd.*<sup>31</sup> The legal correspondent of the *Financial Times* said the decision "advanced manufacturers' product liability by a small but very significant step."<sup>32</sup> Until this decision, not only was the liability of a producer dependent on proof of fault, it only arose if the defect caused death or injury or damage to property or at least imminent danger to the person or to property. The fact that the product did not function or work properly, even if consequential loss such as loss of profit resulted, gave rise to no liability on the producer to someone other than the immediate buyer. In other words, there was no liability in *tort*, as distinct from contract, where mere econ-

<sup>32</sup> A.H. Hermann, *Financial Times*, August 19, 1982.

omic or financial loss resulted from the defect. No one could claim in tort against the manufacturer for the cost of replacing a defective product.

The 1982 decision of the House of Lords in the case of *Junior Books Ltd. v. Veitchi Co. Ltd.*, arose out of a contract by which Junior Books engaged a building company to construct a factory for them. Junior Books' architect nominated Veitchi as specialist subcontractors to lay a floor for the main production area of the factory. Veitchi entered into a contract with the building company to carry out this flooring work but there was no contract between Junior Books (owners of the factory) and Veitchi. Owing to the negligence of Veitchi, the floor developed cracks and proved to be defective and Junior Books sued them in tort for the cost of replacing the floor (estimated at £50,000) plus consequential financial loss, including loss of profits (estimated at £150,000). Veitchi accepted that, if negligence on their part caused danger to the health or safety of anyone or risk of damage to other property, they would be under a liability in tort. Here, however, there was no danger to persons or to any other property. The House of Lords, however (by a four to one majority), held that, where the *proximity* between the producer of faulty work or a faulty article and the user was sufficiently close, the duty of care owed by the producer went beyond a duty merely to prevent harm being done by the faulty work or article and included a duty to avoid faults being present in the work or article itself. It followed that, in such a case, the producer was liable for the cost of remedying defects in the work or article or for replacing it and for any consequential economic or financial loss, even though there was no contractual relationship between the producer and the user.

Now, it has to be noted that one of the majority in the House of Lords, Lord Keith of Kinkel, said that Junior Books Ltd. could not sue merely because they got a bad floor rather than a good one—they could only sue on the basis that the defective floor caused their manufacturing operations to be carried on at a less profitable level than would otherwise have been the case because of the heavy cost of maintenance and could claim the cost of relaying the floor in order to avert or mitigate that loss. It follows that business users of faulty work or articles would be able to take greater advantage of the new rule than private consumers. However, Lords Fraser, Russell and Roskill (the other proponents of the majority decision) seem to have accepted that, so long as the requirement of “proximity” between the producer and user was met, the user *should* be able to claim on the basis that he obtained a bad article rather than a good one as well as for loss which was consequential on the article being defective.

On the special facts of the *Junior Books* case, proximity between producer and user was shown by the evident reliance of the user on the skill and judgment of Veitchi; and Veitchi, who were nominated to do the work by Junior Books’ own architect, must have known that Junior Books would rely upon them. Lord Roskill said the concept of proximity was analogous to the language of section 14(1) of the Sale of Goods Act 1979, whereby the contractual obligation of the seller to the buyer that goods should be reasonably fit for their purpose is dependent on the express or implied reliance by the buyer on the seller’s skill and judgment. He added that, as between an ultimate purchaser and a manufacturer, proximity would *not* easily be found to exist in the ordinary everyday transaction of purchasing chattels “when it is obvious that in truth the

real reliance was upon the immediate vendor and not upon the manufacturer."<sup>33</sup> That statement suggests that the courts are likely to interpret the new rule fairly narrowly but, in the light of the modern marketing methods used by manufacturers, Lord Roskill's logic is not convincing. Manufacturer advertising in general and brand advertising in particular, frequently accompanied by the use of manufacturer guarantees and other literature, are often today key factors in consumer choice, and it is not to my mind at all "obvious" that consumer reliance is on the immediate vendor and not on the manufacturer. In any case it may be argued that there is some degree of reliance on both. Our law develops step by step and this decision seems to me more like a stepping stone than a halting place.<sup>34</sup> I think that the dissenting Law Lord, Lord Brandon, was right when he said that the effect of the House of Lords accepting Junior Books' contention would be that manufacturers warrant to the ultimate consumer or user that goods they produce are "as well designed, as merchantable and as fit for their contemplated purpose as the exercise of reasonable care could make them."<sup>35</sup> (Lord Keith said something similar.<sup>36</sup>) Where a manufacturer issues literature making specific claims in respect of his product, as in *Lambert v. Lewis*,<sup>37</sup> it would seem that reliance on the manufacturer is particularly likely (and indeed intended) on the part of those who read that literature. And one may add that, in the earlier case of *Anns v.*

<sup>33</sup> [1983] A.C. 520, 547; [1982] 3 W.L.R. 477, 495.

<sup>34</sup> Cf. Robert Stevens, "*Hedley Byrne v. Heller*: Judicial Creativity and Doctrinal Possibility" (1964) 27 M.L.R. 121, 142.

<sup>35</sup> [1983] A.C. 520, 551; [1982] 3 W.L.R. 477, 499.

<sup>36</sup> [1983] A.C. 520, 536; [1982] 3 W.L.R. 477, 486.

<sup>37</sup> [1982] A.C. 225; [1981] 1 All E.R. 1185.

*Merton London Borough*,<sup>38</sup> Lord Wilberforce said that, in determining whether there is sufficient “proximity” to give rise to a duty of care owed by the alleged wrongdoer to the person who has suffered damage, one has to ask whether it was in the reasonable contemplation of the former that carelessness on his part may be likely to cause damage to the latter. On that test, a manufacturer does seem to have a proximate relationship to the ultimate user or consumer.

Assuming that the required proximity between producer and user can be shown, the financial loss that is claimable may include the additional financial loss caused by the user’s own financial weakness which prevented him carrying out repairs to the defective article at once, if the user’s financial weakness is foreseeable. This is the result of another court decision in 1982: *Perry v. Sidney Phillips & Son*.<sup>39</sup> The Court of Appeal seemed to suggest that if a business user loses profits because internal financial problems prevent him putting right the defects at once or if a business or private consumer incurs expense from loss of use of the goods or higher repair costs because financial problems prevent him doing the repairs until repair costs go up, such losses can be claimed in a negligence action against the producer of the defective article, provided that those financial problems are reasonably foreseeable. A manufacturer will not usually be fully aware of the financial position of the ultimate user or consumer with whom he is not dealing direct but it is quite possible that a court may expect a manufacturer of such expensive consumer goods as a car to realise that the average consumer who has just paid out the purchase money may have exhausted

<sup>38</sup> [1978] A.C. 728, 751–2; [1977] 2 All E.R. 492, 498.

<sup>39</sup> [1982] 1 W.L.R. 1297; [1982] 3 All E.R. 705.

available funds and may not have money left over to expend on putting right defects of which he was not aware at the time of purchase. Moreover, it may be reasonable for the user to postpone incurring repairing costs so long as the producer continues to deny any responsibility for the defects.

My excursion into the field of case law is intended to illustrate the point that the common law is not incapable of further development, as some commentators seemed at one time to think.<sup>40</sup> Particularly when Parliament is inactive the courts will continue in their traditional task of adapting existing law to changing circumstances. But I must not exaggerate what the courts have done or are likely to do in the way of advancing the cause of stricter liability on manufacturers for defective products. It is really not feasible for the courts to act as a substitute for Parliament in this respect.

The key controversial issues of whether a "state of the art" defence should be allowed, the meaning of "defective," what (if any) financial limits of liability there should be, the availability of insurance cover, whether strict liability should apply to damage to property as well as personal injury—these need to be thrashed out after full debate of the implications and can hardly be determined in the course of arriving at a judgment in one or more cases concerning particular incidents. As Lords Scarman and Fraser recognised in the recent case of *Pirelli General*

<sup>40</sup> For example, Mr. Justice Devlin (as he then was) said in his Presidential Address to the Bentham Club: "Our Lady the Common Law . . . is not as young as she once was and . . . she cannot any longer indulge in activities which in her youth she would have taken in her stride" ("The Common Law, Public Policy and the Executive" [1956] *Current Legal Problems*, p. 15).

*Cable Works Ltd. v. Oscar Faber and Partners*,<sup>41</sup> a case concerning the appropriate limitation period for claims arising out of defective construction work, balancing the conflicting interests (of which consumer protection is one) is such a complex business that it is unsuited to judicial evolution of the law. The problem of latent damage and accrual of cause of action needs legislation and so does the matter of product liability where the claims of consumer protection have to be balanced against the costs and the risk that research and innovation may be inhibited by strict liability on the manufacturer, especially if no "state of the art" defence is allowed. In the Federal Republic of Germany, the courts have applied the doctrine of *res ipsa loquitur* against manufacturers more clearly than our courts<sup>42</sup> and in 1978 introduced legislation to impose strict liability on the pharmaceutical industry.<sup>43</sup> But, as Professor Micklitz has put it, these developments cannot provide "a permanent solution to the problems of the manufacturer's liability."<sup>44</sup> The position in Britain is *a fortiori*.

Needless to say, where rights and remedies are already enshrined in statute, only legislation can change them and, now that Parliament has implemented the Law Commissions' proposals to deal with exemption clauses, it is appropriate that the Law Commissions should turn their attention to improving the basic statutory obligation of the seller to supply goods of merchantable quality and the consumer's statutory remedies. In a recent joint consulta-

<sup>41</sup> [1983] 2 A.C. 1; [1982] 2 W.L.R. 6.

<sup>42</sup> The decision of the Bundesgerichtshof in the "chicken-pest" case (1968) B.G.H.Z. 51, 99 *et seq.*

<sup>43</sup> The Arzneimittelgesetz (Drugs Act).

<sup>44</sup> Reich and Micklitz, *Consumer Legislation in the Federal Republic of Germany*, (1981), p. 178.

tive document, they have provisionally proposed that the implied term should be reformulated by an amending statute so as to make it clear that it applies to every minor defect and includes reference to the durability of the goods and also that the consumer's absolute right to reject for every breach of sections 13 to 15 of the Sale of Goods Act should be modified.<sup>45</sup> Perhaps the courts could have done more to develop the law on merchantable quality to cover the notion of durability. Some judgments did seem to do just that but the Law Commission commented in 1979, after examining three recent cases, that there was a lack of clarity in the existing law. On the authority of two of the cases, "it might be argued that perishable goods are required by law to last longer than non-perishables!"<sup>46</sup> As to the third case, it suggests only that if goods break down after a reasonable time, that *may* show that they were defective at the time of sale.<sup>47</sup> Express reference in legislation to the concept of durability would be helpful. So far as remedies are concerned, the courts are inevitably confined to the remedies of rejection and damages provided for by the Sale of Goods Act. The scheme of remedies the Law Commissions provisionally favour for consumer sales is a right of rejection *except* where the seller can show that

<sup>45</sup> Joint Consultative Document on the Sale and Supply of Goods, 1983 (Law Commission Working Paper No. 85 and Scottish Law Commission Consultative Memorandum No. 58).

<sup>46</sup> *Mash & Murrell Ltd. v. Joseph I. Emanuel Ltd.* [1961] 1 W.L.R. 862; [1961] 1 All E.R. 485; *Cordova Land Co. Ltd. v. Victor Brothers Inc.* [1966] 1 W.L.R. 796; Law Commissions, Report on Implied Terms in Contracts for the Supply of Goods, 1979 (Law Com. No. 95), para. 106.

<sup>47</sup> *Crowther v. Shannan Motor Co.* [1975] 1 W.L.R. 30; [1975] 1 All E.R. 139, C.A.; Law Commissions, *ibid.* paras. 107-109. See also *Lambert v. Lewis* [1982] A.C. 225; [1981] 1 All E.R. 1185.

the nature and consequences of the breach are slight and in the circumstances it is reasonable that the buyer should accept repair or replacement of the goods. Other possibilities are mooted but, to my mind, the attempt to broaden the concept of “merchantable quality” and to find a flexible range of remedies for breach, more in line with the natural expectations of trader and consumer alike, is to be welcomed and only legislation can provide the way forward. The courts could hardly invent a remedy such as the repair of faulty goods because such a remedy has no basis in case law or in the Sale of Goods Act, yet it is a remedy that consumers and traders alike would regard as sensible in appropriate cases.

In tracing the development of the civil law relating to consumer rights through legislative action and through the work of the courts. I have of course been talking about substantive civil law. I have said nothing about whether in practice individuals have been able to enforce their newly enhanced rights. To some extent the new laws are self-enforcing—they give the consumer a better basis for asserting his claim for redress. Redress may well be forthcoming without the need to issue a writ and it may be without the need for a solicitor’s letter. Even legislation which merely consolidates or codifies existing law, like the Sale of Goods Act 1979 and the Supply of Goods and Services Act 1982, has an educative value for traders and the public alike and has provided the occasion for popular publications setting out the rights and obligations applicable to everyday transactions. Reasonable and fairminded traders do not have to be served with a writ to do the right thing. But sadly, in those cases where a trader does not wish to grant a customer his legal rights and stands out obstinately against giving

way—the trader who is not reasonable and fairminded—he can too often do so in the full confidence that he can get away with it and that the customer is most unlikely to take him to court. The costs and trouble of doing so may be out of all proportion to the amount in dispute. As Lord Devlin has said:

“The trouble at the root of our legal system is that we have allowed it to grow up in an atmosphere in which, where justice is concerned, money is hardly an object. But money must always be an object for those who believe in justice, for if the system is too expensive it will not be used and so injustices will go without redress.”<sup>48</sup>

Moreover, there are many instances where consumer litigation will be in vain because the enforcement of judgments is too often ineffective or the defendant is without sufficient assets to meet a judgment against him to pay damages.

The normal costs of going to court are too great, especially the risk of paying the costs of the defendant's lawyer if the defendant wins. Some potential plaintiffs whose income and capital are below certain limits are eligible for legal aid but legal aid is rarely available for typical consumer claims. In practice the criterion used by the legal aid committees who administer the legal aid scheme is whether a prudent unaided person who has adequate but not over-abundant means of his own would choose to risk them by bringing the action.<sup>49</sup> Prudent unaided per-

<sup>48</sup> Devlin, Foreword to *Going to Law—A Critique of English Civil Procedure* (A Justice Report) (1974), p. v.

<sup>49</sup> Borrie, “New Developments in Procedures for the Protection of Consumers in England,” Symposium on *Judicial and Quasi-Judicial Means of Consumer Protection* (Commission of the European Communities, 1975) p. 219.

sons are not likely to pursue a small claim in ordinary court proceedings because the risk of incurring costs out of all proportion to the amount of the claim are too great.

A considerable advance of great practical benefit to consumers was made in 1973 since when there has been available in the county courts a special arbitration procedure for dealing with "small" claims which were originally limited to £75 and is now available for claims up to £500.<sup>50</sup> Inevitably, consumer organisations complain that the limit is too low but the small claim arbitration procedure has given the public access to an informal low cost procedure, run by the county court registrar, which has the important concomitant benefit to the consumer plaintiff who appears in person that, if the trader defendant engages a solicitor or barrister, the cost of so doing cannot be claimed from the plaintiff even if the plaintiff loses the case. The traditional rule that the loser is ordered to pay the winner's legal costs has been abrogated in the small claims procedure.

An alternative to the county court small claims arbitration procedure is available for disputes in some areas of consumer complaint, *i.e.* those where codes of practice and arbitration procedures have been negotiated between the Office of Fair Trading and the relevant trade association, such as the Association of British Travel Agents and the Motor Agents Association. Arrangements have been made for low cost arbitration with the independent Chartered Institute of Arbitrators or otherwise and is normally conducted on the basis of documents only. Some members of the public, reluctant perhaps to lose a day's

<sup>50</sup> Lord Chancellor's Department, *Small Claims in the County Court* (revised ed., 1981).

work to be in court or lacking confidence in their powers of oral expression, may prefer documents only arbitration. On the other hand, some would argue that the absence of an oral hearing makes it more difficult to arrive at the truth. The important fact to my mind is that these arbitration arrangements provide an alternative choice of forum. Following Lord Devlin's train of thought, money must be an object for those who believe in justice and to me it is idle to insist that only some forum that more closely approximates to the traditional ideal will suffice.

Enforcement of a civil judgment is not to be taken for granted. It depends on the winning plaintiff taking the initiative and it may involve further expense. In a report published in 1979, the National Consumer Council said the difficulties of enforcement "undermine the whole system of redress for civil claims" and the consumer who successfully pursues a small claim in the county court is too often left with "a hollow victory."<sup>51</sup> As long ago as 1969 a committee established by the Lord Chancellor under the chairmanship of Mr. Justice Payne recommended that enforcement offices should be set up attached to every county court with the court itself taking the responsibility to enforce money judgments.<sup>52</sup> Northern Ireland has been given such an office but not the rest of the United Kingdom.

It is commonplace that you cannot get blood out of a stone. What is remarkable about English law at the present time is the relatively easy way in which someone running a business can assume the properties of a stone. The magic is provided by the doctrine of limited liability. Time

<sup>51</sup> National Consumer Council, *Simple Justice* (1979), p. 44.

<sup>52</sup> Report of the Committee on the Enforcement of Judgment Debts, 1969 (Cmnd. 3909).

and again in recent years, we have seen the scandal of a business, operating under the umbrella of limited liability, taking deposits and part payments from members of the public, as well as supplies of various kinds on credit from other traders, and when the going gets rough, the company is put into liquidation. The Report of the Cork Committee on Insolvency, published in 1982, pointed out that the immediate victims of this type of sharp practice are ordinary and unsophisticated members of the public who can ill afford to lose their money<sup>53</sup>:

“They are shocked and bewildered at what has happened to them, and they are puzzled why so little ever seems to be done to recover their money or deal with those responsible.”

The Cork Report is bold and hard hitting, referring to the “now universal dissatisfaction with this breach of the law” which “breeds both disrespect and contempt for the law.”<sup>54</sup>

I think the public are particularly offended and shocked that the individuals who have run the company appear to be able to liquidate it leaving a trail of debts behind them and almost at once, often in the same town, form a new company with a fresh name, meanwhile continuing to enjoy a considerable life style. Sometimes, the individuals concerned will give the new company a name similar to that of the old company and will purchase the assets of the old company at a discount from the liquidator.

The Cork Committee said it would be a matter for reproach if the law remains complacent and fails to make any attempt to deal with this problem.<sup>55</sup> The fresh

<sup>53</sup> Cmnd. 8558, para. 1743.

<sup>54</sup> *Ibid.* para. 1738.

<sup>55</sup> *Ibid.* para. 1742.

approach they called for includes three proposals that to my mind are at once compelling and clear: (i) the introduction of a new concept of “wrongful trading” so that the individuals concerned in managing a company’s affairs may be made personally liable for the financial consequences of their wrongful or reckless conduct; (ii) the imposition of personal liability on the future trading of those responsible already for the failure of one company and (iii) the disqualification of delinquent directors.

Key to an appreciation of the first of these proposals is the concept that where a company is insolvent or unable to pay its debts as they fall due, it will be engaged in “wrongful trading” if it then incurs liabilities to others without a reasonable prospect of meeting them in full and any director of the company who is a party to the carrying on of the company’s trading may be made personally liable for the company’s debts if he knew or, as an officer, ought to have known that the trading was wrongful.<sup>56</sup> Taking payment in advance for goods to be supplied with no reasonable prospect of being able to supply them or return the money in default—a common consumer grievance, as I have said—would be a clear example of “wrongful trading.”

At present an honest director cannot be made personally liable for the company’s debts, however recklessly or unreasonably he may have behaved. The Cork proposals would radically change that and those who abuse the privilege of limited liability could be made personally responsible for the results of their action or inaction.

The Cork Committee were particularly concerned to make it much more difficult for those who have been

<sup>56</sup> *Ibid.* para. 1806.

responsible for the failure of one company with limited liability immediately to recommence trading through the medium of another. Urging automatic and immediate safeguards, they said that:

“a person who has been responsible for the failure of one company, and who wishes to recommence trading, should initially at least be required to do so without the benefit of limited liability.”<sup>57</sup>

The Cork proposals for disqualifying delinquent directors are of course intended to reduce the likelihood that a director who has abused his position once will do so again. Present rules, even though amended as recently as 1976,<sup>58</sup> are too relaxed, leave too much discretion to the court and are easily circumvented. The Cork Report proposes that, in certain circumstances, disqualification should be mandatory and anyone who contravenes a disqualification order should be personally liable for the company's debts.

These bold proposals of the Cork Committee deserve an equally bold response from Government. They are general proposals not confined to any particular trade or profession. In the recent past the Government has too often acted only when abuse and scandal has affected a particular industry and the legislation it has introduced has been akin to shutting the stable door after the horse has bolted. This was the case when various insurance companies collapsed in the 1960s and 1970s leaving hundreds of thousands of members of the public uninsured. The Policyholders Protection Act 1975 was passed whereby, if an insurance company fails to meet its liabilities to policyholders, they can be indemnified out of levies imposed on

<sup>57</sup> *Ibid.* para. 1826.

<sup>58</sup> Insolvency Act 1976, s.9.

insurance companies generally. In 1974 several air tour operators collapsed, the deposits of many intending travellers were lost, thousands of holidaymakers already abroad were stranded and a major rescue operation had to be mounted. As a result the Air Travel Reserve Fund Act 1975 was passed creating a fund contributed to by travel agents and tour operators which complements the funds created by the Association of British Travel Agents.

The 1975 statutes were the product of crisis management rather than the outcome of carefully thought out policy. Nonetheless, clearly the public benefits from the existence of these various funds. It also benefits from the funds created by a number of professions, such as solicitors and estate agents' organisations, to provide compensation if one of their number goes bankrupt. And that is not the end of it—indemnity schemes, often backed by insurance, have been arranged by many trade associations to protect the customers of any of their members who may go bankrupt. There are several such in the building trade, for example those organised by the Glass and Glazing Federation and the Federation of Master Builders. The various newspaper and periodical associations have set up Mail Order Protection Schemes to provide a measure of protection for those who send off money in response to an advertisement for goods or services contained in a newspaper or periodical.

The great advantage of the Cork proposals, apart from the fact that they would in no way be limited to any particular trade or profession, is that they would operate as a powerful deterrent to unfair trading. Honest traders often grumble about the various types of indemnity schemes I have just referred to because they involve helping to compensate customers of their more reckless and feckless

fellow traders who often collapse for the very reason that they offer their goods or services at unrealistically low prices to the competitive disadvantage of the honest and cautious trader. The Cork proposals have advantages for honest traders and customers alike.

### *III. The Role of Criminal Law*

Developments in the civil law, helpful though they have been for consumer protection, have, I believe, been overshadowed in importance by the creation of new criminal offences. Among ordinary members of the public and among traders of all kinds, the Trade Descriptions Act 1968 has become the best known of recent developments in consumer protection law. It is a strong example of the use of statutory criminal law to combat trading abuses. Trade associations have made it their business to purvey information about the Act to their members and training schemes have sought to ensure that even the rawest of recruits to the staff of retail outlets is warned of the Act's implications. They may not know the legal subtleties but they are generally aware that the Act forbids false or misleading descriptions of goods and that the local authority Trading Standards Department has power to enforce it. In 1976, my predecessor as Director General of Fair Trading made detailed proposals for improvements in the Trade Descriptions Act, for example, that misdescription of services should, like misdescription of goods, be a strict liability offence and that misdescriptions of real property

should be brought within the terms of the Act for the first time.<sup>1</sup> These proposals have not been implemented but, even as it is, the Act has been a key factor in improving accuracy and honesty in the labelling of goods, price display and brochures for package holidays. Much of its success rests, I believe, in it being part of the *criminal* law and in requiring local authority Trading Standards Departments, as a positive obligation, to enforce the Act.<sup>2</sup> The Act is enforced by public officials at public expense and has given rise to a useful body of case law in support and explanation of the Act. It is not part of the civil law which can be enforced only at the initiative of an individual and, subject to the limited application of the Legal Aid Scheme, at the expense of the individual. Nor is enforcement left, as criminal law normally is, to the police who are bound to give greater priority to what they will consider *real* crimes, *i.e.* what Lord Devlin has described as “sins with legal definitions.”<sup>3</sup>

The Consumer Safety Act 1978 provides another example of the use of the criminal law. It was passed in response to the inadequate coverage of earlier legislation and the absence of any power to enable the Government to act speedily to deal with new products presenting fresh hazards. The Secretary of State for Trade and Industry is given wide powers to make safety regulations, it being a criminal offence to market goods not complying with such regulations, and also to make prohibition orders and pro-

<sup>1</sup> Review of the Trade Descriptions Act 1968—A Report by the Director General of Fair Trading (1976), Cmnd. 6628.

<sup>2</sup> Trade Descriptions Act 1968, s.26.

<sup>3</sup> Devlin, *Morals and the Quasi-Criminal Law and the Law of Tort*, Holdsworth Club Presidential Address. March 17, 1961, published in *Enforcement of Morals* (1965) 26, 27.

hibition notices, with criminal sanctions, so as to stop outright the supply of inherently dangerous goods.

The Food and Drugs Act and the Weights and Measures Acts are effective for similar reasons—they too are part of the criminal law and enforced by public officials. The *functional* value of criminal law in the field of consumer protection is a high one and it has a respectable pedigree. Professor Leonard Leigh has described how the courts of the 1870s held that no *mens rea* was required to convict persons of selling adulterated food as unadulterated contrary to section 2(2) of the Food and Drugs Act 1872.<sup>4</sup> “A *mens rea* requirement,” he says, “would have rendered the provision ineffectual” and the principles of both strict liability and vicarious liability developed because without them enforcement would be difficult, if not impossible:

“If the master were permitted to escape because the fault was that of his servant, an easy excuse would have been created, and the master would not have been under the powerful incentive of liability to ensure enforcement of the legislation within the enterprise.”

Thus it is that a licensee whose barmaid sold a short measure of whisky has been held to have “caused” the sale and to be guilty of an offence under the Weights and Measures Act, despite his ignorance of the facts.<sup>5</sup>

Of course, when I speak of the effectiveness of enforce-

<sup>4</sup> Leonard Leigh, *Strict and Vicarious Liability: A Study in Administrative Criminal Law* (1982), pp. 16–19.

<sup>5</sup> *Sopp v. Long* [1970] 1 Q.B. 518; [1969] 1 All E.R. 855. In *Bellerby v. Cole* [1983] 1 All E.R. 1031, 1036; [1983] 2 W.L.R. 687, 691–2, Lord Brandon, delivering the judgment of the House of Lords, said he did not, as at present advised, see any reason to doubt the correctness of the decision of the Divisional Court in *Sopp v. Long*.

ment by public officials of consumer protection legislation, I do not necessarily mean that a prosecution is mounted and a conviction obtained. A telephone call from a Trading Standards Officer or Environmental Health Officer pointing out to the trader the error of his ways or a firm warning given that if there is a "next time" he will receive a summons—these actions are often sufficient. The general deterrent value of the law and the appearance in the local or trade press of reports about other traders being convicted are important too.

But the creation of new criminal offences by statute, albeit in the name of a very laudable objective, is a matter of some controversy, particularly if the offence is one of strict liability. One of the trustees of the Hamlyn Trust has commented that we in Britain are "apt to meet social problems by creating crimes like confetti."<sup>6</sup> The Legal Adviser of the Consumers' Association has suggested that, where it is desirable for certain conduct to be prohibited but the conduct is not such that most people would consider it wicked, it should no longer be subject to criminal penalties.<sup>7</sup> Instead, it should be termed an infringement or a contravention—part of what he has called "a Middle System of Law" and subject only to civil penalties. In 1980, the organisation Justice, the British section of the International Commission of Jurists, published a report entitled "Breaking the Rules," calling for the removal from the criminal calendar large numbers of statutory offences.<sup>8</sup> Much of the criminal law would be decriminalised and

<sup>6</sup> Professor Brian Hogan, Working Paper 2: Strict Liability, (1975) 2 *Ottawa Law Review*, 258.

<sup>7</sup> David Tench, *Towards a Middle System of Law*, (Consumers' Association, 1981).

<sup>8</sup> *Breaking the Rules: The Problem of Crimes and Contraventions*, (Chairman of Committee: Paul Sieghart) a Report by Justice (1980).

“the stigma,” as they put it, of being prosecuted and tried for a crime, convicted of a crime and acquiring a criminal record, would be removed in respect of many present-day offences. They would become contraventions subject to a civil penalty.

This report by Justice estimates that there must be over 7,000 statutory offences and, as my Office has been responsible for a few of them, let me explain by way of example why we came to propose the offences comprised in the Consumer Transactions (Restrictions on Statements) Order 1976<sup>9</sup> and the Amendment Order of 1978,<sup>10</sup> made under the procedures contained in Part II of the Fair Trading Act. I will defend the value to the public of the Order but will not attempt to defend the prolix title which is common to so much modern legislation! In 1973, the Sale of Goods Act was amended so that any contractual term or notice purporting to exempt a seller from his implied obligations to supply goods of merchantable quality, reasonably fit for their purpose, etc., was void in all consumer contracts.<sup>11</sup> This was purely a matter of civil law and it followed that no penalties were imposed for the continued use of such terms. In the years following 1973 notices like “no money refunded” did continue to be used quite widely and these notices, in our view, were calculated to mislead consumers into thinking their rights were less than they were—if goods are faulty and the consumer acts promptly enough, he is entitled in law to a refund of the price irrespective of any term or notice to the contrary. It seemed to my Office that the *criminal* law had to

<sup>9</sup> S.I. 1976 No. 1813.

<sup>10</sup> S.I. 1978 No. 127.

<sup>11</sup> Supply of Goods (Implied Terms) Act 1973, s.12, substantially re-enacted by the Unfair Contract Terms Act 1977, s.6.

come in to back up the change in the civil law and make it more effective—the use of such void notices is now a criminal offence.

Now, like so many trading offences it comes within the category of a strict liability offence, not dependent on proof of *mens rea*, though there are various defences available on the basis that the offence was due, for example, to mistake or the act or default of another provided that the accused took all reasonable precautions and exercised all due diligence.<sup>12</sup> The 1963 Hamlyn lecturer, Baroness Wootton, delivered a powerful argument to the effect that in recent years a perceptible shift had occurred away from the punitive role of the criminal law towards the preventive role and that in the result there was little cause to be disturbed by the growth of offences of strict liability.<sup>13</sup> According to Barbara Wootton, as much and more damage in the modern world is done by negligence or indifference to the welfare and safety of others, as by deliberate wickedness. In her view, “the contemporary extension of strict liability is not the nightmare that it is often made out to be . . . its supposedly nightmarish quality disappears once it is accepted that the primary objective of the criminal courts is preventive rather than punitive.”<sup>14</sup>

One cannot always find much unity of thought between social scientists and judges but I do see a link between these thoughts of Barbara Wootton and the words of Lord Diplock some eight years later. Lord Diplock stated very clearly the basic rationale for strict liability to deal with

<sup>12</sup> Fair Trading Act 1973, ss.24–25.

<sup>13</sup> Barbara Wootton, *Crime and the Criminal Law—Reflections of a Magistrate and Social Scientist* (1963, second edition 1981), Chapter 2.

<sup>14</sup> *Ibid.* p. 51.

trading malpractices in the well known case of *Tesco v. Natrass* in 1971,<sup>15</sup> involving the Trade Descriptions Act:

“Consumer protection, which is the purpose of statutes of this kind, is achieved only if the occurrence of the prohibited acts or omissions is prevented. It is the deterrent effect of penal provisions which protects the consumer from the loss he would sustain if the offence were committed . . . . The loss to the consumer is the same whether the acts or omissions which result in his being given inaccurate or inadequate information are intended to mislead him, or are due to carelessness or inadvertence.”

But the *Tesco* case is one in which the House of Lords made a significant qualification to the impact of the Trade Descriptions Act as a consumer protection measure. *Tesco* was prosecuted for offering to supply goods to which a false indication had been given of the price at which the goods were being offered.<sup>16</sup> *Tesco* argued that what had happened was the fault of their branch manager and they were therefore entitled to the defence provided by section 24(1) of the Act that the “act or default” was due to “another person” and that they had used all due diligence to avoid the commission of the offence through training, inspection, and a careful system of supervision to ensure that shops were managed properly. The House of Lords held that *Tesco* were entitled to be acquitted on the basis of such a defence—the manager was not someone in the top management of the company whose acts could be attributed to the company as such, and *Tesco* were entitled to be absolved if they could establish that the offence was due to the “act or default” of the shop

<sup>15</sup> [1972] A.C.153, 194; [1971] 2 All E.R. 127, 151.

<sup>16</sup> Trade Descriptions Act 1968, s.11(2).

manager and that the company had used all due diligence. Justifying the result of the *Tesco* decision, Lord Reid said this<sup>17</sup>:

“It is sometimes argued—it was argued in the present case—that making an employer criminally responsible, even when he has done all that he could to prevent an offence, affords some additional protection to the public because this will induce him to do more. But if he has done all he can how can he do more?”

Lord Reid’s point seems to be logically impeccable. Yet it may be all too easy for the employer to *appear* to have done all he can, to point to systems and precautions and the training of staff. And the mere suggestion of such a defence being raised may induce Trading Standards Departments not to proceed for the simple reason that in practice the defence is difficult to counteract. Very soon after the *Tesco* decision, the Law Commission expressed its support of the principle that companies should be criminally liable in the regulatory field, and specifically liable to prosecution under the Trade Descriptions Act<sup>18</sup>:

“The main objective of criminal law is the prevention of crime and it is argued that the publicity attendant upon the prosecution of companies has a strong deterrent effect. The prosecution of a company for the commission of an offence symbolises the failure

<sup>17</sup> [1972] A.C. 153, 174; [1971] 2 All E.R. 127, 135.

<sup>18</sup> *Criminal Liability of Corporations*, Law Commission Working Paper No. 44 (1972), para. 48. See also the view of Professor Glanville Williams: “That a company should not be liable for an offence of negligence committed by its branch manager, who after all represents the company in the particular locality, is a considerable defect in the law. . . . What is evidently needed is a statutory redefinition of the officers whose acts and mental states implicate the company.” (Glanville Williams *Textbook of Criminal Law* (2nd ed., 1983) p. 973.

of control by the company, and it is socially desirable to have the company's name before the public. We think that it is probably true that the publicity given a corporation. . . . is valuable in the field of regulatory offences the purpose of which is often to ensure adherence to proper standards, for example in respect of foodstuffs, drugs and other articles of consumption. This publicity achieves its effect in the main through reports in the local press, so having a maximum impact upon consumers. . . .”

The Justice report “Breaking the Rules” suggests that conduct should be categorised as a crime only if it involves some real and deliberate moral turpitude. I assume and hope that the authors would include in that category such trading malpractices that are tantamount to fraud and dishonesty as the deliberate sale of adulterated meat and the turning back of motor vehicle odometers. What worries me is that the difficulty of *proving* intention in such cases as these under the Food and Drugs Act and the Trade Descriptions Act is such that if intention were to be a necessary ingredient of such offences few prosecutions will be brought, fewer still will be successful and the public will be worse off because the deterrent force of the law will be seriously reduced. Part of the deterrent force of the law at present is the very stigma and obloquy of being convicted that the Justice report considers so wrong.

So far I have indicated my prejudice in favour of the criminal law and the deterrent value that strict liability has had in reducing the incidence of trading malpractices. But I must now admit that there is much merit in the Justice proposals and that my own concerns to combat trading abuses may conceivably be accommodated by them. Some trader malpractices would still be classed as crimes

because they involve real moral turpitude. Other malpractices would be classed as contraventions and the proposal that contraventions should be dealt with by administrative agencies (particularly local authorities, I imagine), subject to appeal to the magistrates' courts, retains the advantage of enforcement by specialist public officials at public expense which I have mentioned as one of the key features of present-day enforcement of the Trade Descriptions Act, the Food and Drugs Act, etc. Moreover, enforcement of contraventions would be more direct and, in my opinion, it would be desirable for an employer to be vicariously liable for the contraventions of his employees. When, in the *Tesco* case, Lord Reid objected to "making an employer *criminally* responsible, even when he has done all that he could to prevent an offence"<sup>19</sup> (my italics), he was surely articulating a basic sense of injustice about making anyone responsible in criminal law for the sins of their employees. Lord Morris stressed: "it is important to remember that it is the criminal liability of the company that is being considered. In general criminal liability only results from personal fault. We do not punish people in criminal courts for the misdeeds of others."<sup>20</sup> By contrast, it has long been accepted that in *civil* law an employer is responsible for the torts of his employees and, more significant, an employer-trader is strictly liable for breach of any of the obligations implied by the Sale of Goods Act (including misdescriptions of goods sold) even when he has done all that he can do to prevent such breach and the cause is some act or default of an employee. Strict *civil* liability helps to ensure high standards

<sup>19</sup> [1972] A.C. 153, 174; [1971] 2 All E.R. 127, 135.

<sup>20</sup> [1972] A.C. 153, 179; [1971] 2 All E.R. 127, 139.

and responsibility in trading and judicial or public objection to vicarious liability in respect of false trade descriptions would surely evaporate if they constituted contraventions rather than crimes. It is significant that when, in the last century, the courts began to impose vicarious liability on publicans in respect of adulteration, the courts seemed to regard these newly created regulatory offences as less than truly criminal. This was at any rate *one* factor in the courts' willingness to develop the principle of vicarious liability in respect of statutory offences. Efforts made by the employer to avoid commission of a contravention should go to the *amount* of civil penalty imposed rather than to liability.

I agree also with much of the criticism of the criminal law made in the Justice report, particularly its reference to the sense of unfairness for traders (and others) of being convicted in a criminal court and acquiring a criminal record when no intent or recklessness on their part has been proved. And Justice has I think pinpointed quite a common feeling of resentment against having to pay a fine when you have inadvertently broken the law. It may debase the coinage of the criminal law and, as Professor Glanville Williams has put it, strict liability is "apt to create a burning sense of grievance."<sup>21</sup> The doubt I have

<sup>21</sup> Glanville Williams, *Textbook of Criminal Law* (2nd ed., 1983) p. 927. Similarly, Lord Devlin considers that the ordinary man still thinks of "crime" as conduct that is disgraceful or morally wrong. "But he cannot be expected," says Lord Devlin, "to go on doing so for ever if the law jumbles morals and sanitary regulations together and teaches him to have no more respect for the Ten Commandments than for the wood-working regulations. Meanwhile . . . it may cause him unnecessary distress if for some petty offence which he may not even himself have committed, he is classed among criminals and if in the machinery of the law he is processed as if he were one." (Devlin, *ibid.* p. 31).

is whether there would be much less resentment or sense of grievance if the labels are changed and, instead of a fine being imposed for a criminal offence, the trader has to pay a civil penalty for a "contravention."

One of the weaknesses of the criminal law at the present time in its application to trading malpractices is that, at least with some traders, convictions are treated as tiresome pinpricks, minor inconveniences that are shrugged off and the fines put down as a business expense. Too often the fines imposed do not even match the profit that has been made by the trader out of his malpractice. This is most obviously noteworthy in those cases where a trader has been convicted of misdescribing the mileage done by a car he is selling. In *R. v. Hammerton Cars Ltd.*,<sup>22</sup> car dealers had been convicted on two counts of supplying cars to which a false trade description had been applied and had been fined a total of £1,500. The Court of Appeal dismissed the dealers' application for leave to appeal against sentence and I would commend the words of Lawton L.J.<sup>23</sup>:

"In this case the prosecution did not allege that the appellants had been actively unscrupulous; but they, for their part, did not seek to prove that they had taken all reasonable precautions and exercised all due diligence. In plain English, they took a chance that the mileometer readings were genuine. Traders in secondhand motor cars should not take chances; and if they do and are prosecuted to conviction the courts should discourage them by taking all the profit out of the transaction and a good deal more."

<sup>22</sup> [1976] 1 W.L.R. 1243; [1976] 3 All E.R. 758.

<sup>23</sup> [1976] 1 W.L.R. 1243, 1250-1251; [1976] 3 All E.R. 758, 765.

Unfortunately, not all judges or magistrates are as robust as Lawton L.J.

It seems to me that that particular weakness will not be altered by changing the labels unless of course the public agencies and the courts became willing to exact *larger* sums by way of civil penalties than they have been willing to exact by way of a criminal fine. If that is done and, if, as the Justice report suggests,<sup>24</sup> the new system would provide the opportunity for greater imagination in the devising of suitable penalties for contravention, that will be a major improvement in the effectiveness of the law. I agree with the report that shutting down a restaurant will remove the cockroaches from the kitchen far more quickly than prosecuting the owner in order to impose a fine on him. Mr. Paul Sieghart, chairman of the Executive Council of Justice and chairman of the committee that produced this report, has pointed out that fines are not necessarily the best way of ensuring that a regulatory system actually achieves what the regulations are there for<sup>25</sup>:

“Imagine a restaurant owner caught with mice and cockroaches in the kitchen. What happens at the moment is that about 6 weeks after the event he is served with a summons and about 3 months after that he will come up before the court, found guilty and fined. What nobody then enquires into is whether the mice and cockroaches have gone away. There are several countries in Continental Europe where all that is quite different. The restaurant owner is told that if the mice and cockroaches are still there on

<sup>24</sup> *Ibid.* p. 28.

<sup>25</sup> Transcript of the Annual Members' Conference of Justice, on the subject of Decriminalisation, November 27, 1982, p. 4. Quoted with Mr. Sieghart's express permission.

Monday, the council will send in its own fumigation team and he will, of course, get the bill.”

Mr. Sieghart did add that “such ideas are radical and revolutionary” and he did not want to press them too far. It is my own view that a wider *range* of powers than exist at present, to be exercised either directly by the local authority (subject to appeal to the courts) or exercised by application to the courts, *e.g.* for an order to stop illegal trading or to close down a shop, would be a useful addition to the enforcement armoury. They would be a local parallel to the powers exercised centrally at present by the Office of Fair Trading under Part III of the Fair Trading Act. Where there have been persistent breaches of the law (whether of the criminal law or the civil law), *e.g.* a restaurant persistently breaking the Food and Drugs Act, the Office has power to request written assurances that the trader will refrain from that course of conduct and if the assurance is refused or broken, to seek court orders akin to injunctions with contempt of court as the ultimate sanction. These powers exist both against companies and against their directors personally.

One particular weakness of the criminal law when a non-police agency is the prosecuting authority is mentioned in a useful research paper printed in the companion volume to the report of the Royal Commission on Criminal Procedure. A non-police agency like a local authority Trading Standards Department is reluctant to prosecute unless, contrary to the actual burden of proof for strict liability offences, there *is* some form of intent.<sup>26</sup> Related to that is a reluctance to prosecute because publicity is thought to have an adverse effect on a trader out of all

<sup>26</sup> Royal Commission on Criminal Procedure, *Prosecutions by Private Individuals and Non-Police Agencies*, Research Study No. 10. p. 127.

proportion to the gravity of the offence. If even prosecuting authorities are doubtful of the appropriateness of the criminal law being used to the full where no intent can be shown, the law may be less adequately enforced than if such cases were taken out of the criminal law and dealt with as contraventions.

Another advantage of trading malpractices being treated mostly as contraventions is that the burden of proof ought to be lower than for criminal offences. I see no reason for the Justice report assuming that the burden of proof should be the same.<sup>27</sup> In this connection, it is of interest that a Court of Appeal judge expressed doubts about the heavy burden of proof in criminal cases in a lecture delivered in 1980. Lord Justice Ormrod said<sup>28</sup>:

“The rigid rule in criminal cases, that the burden of proof beyond reasonable doubt remains on the prosecution throughout, sometimes leads to acquittals which appear to be quite unrealistic. There is scope, I think, for limited modifications of this rule.”

Whatever the merits or demerits of the present heavy burden of proof in criminal cases, it is not at all obvious that the same rule should apply to contraventions.

It seems that in recent years there has been something of a backlash against the proliferation of new criminal offences in the field of trading malpractices as elsewhere. I think this backlash has occurred quite quickly because as recently as 1973 the Fair Trading Act set out detailed provisions whereby the Director General of Fair Trading may

<sup>27</sup> *Ibid.* p. 24.

<sup>28</sup> Ormrod, *Judging and the Processes of Judging*, Holdsworth Club Presidential Address, March 7, 1980, Jubilee Lectures celebrating the foundation of the Faculty of Law, University of Birmingham (1981), p. 187.

make proposals that the Secretary of State should create new criminal offences by statutory order to deal with practices that mislead or confuse consumers. I have mentioned the proposal that became the Consumer Transactions (Restriction on Statements) Order 1976. But in the same year the Government declined to agree to a proposal to make it a criminal offence if a mail order company failed to supply goods ordered or return money paid in advance within a specified period. A key objection of the Government, as stated by the Minister in Parliament, was that the proposal "would give consumers, by means of the criminal law, rights in respect of their transactions which should be conferred, if at all, by civil law" and "would regulate by criminal sanction not only the formation of the original contract—we accept that as right in the Trade Descriptions Act—but the effects of breach of the contract."<sup>29</sup> Yet the whole point of making the proposal in the first place was the obvious weakness of civil law remedies for breach of contract in the face of fraudulent or undercapitalised firms who use the advertising columns of the newspapers to obtain deposits and pre-payments from the public without the ability or sometimes the intention to supply the goods ordered.

I have already mentioned that detailed proposals made the same year by my predecessor to amend the Trade Descriptions Act have not been implemented. This is despite the fact that the Government had specifically asked him to review the working of the Act. In recent years there seems to have been not just a reluctance on the part of Ministers to use the machinery of the criminal law to achieve new

<sup>29</sup> John Fraser M.P., Minister of State, July 30, 1976 (House of Commons Hansard, column 1172).

measures of consumer protection but even a reluctance to introduce improved models of existing pieces of that machinery designed to achieve greater effectiveness and efficiency. It would admittedly require boldness of a quite exceptional kind for Ministers to begin to create a "middle system of law" but surely it is not asking for much to press for some sort of regular maintenance and repair and updating of existing law. I do not think it is contradictory of my earlier praise for the Trade Descriptions Act for me to concur in the view expressed last year by a chief trading standards officer. He said<sup>30</sup>:

"[The Act] has served us well. The concepts and draughtsmanship were first class, but in the light of experience the Act is now showing its age. [The 1976 report] identified several fairly non-controversial issues which required urgent review. Eight years later we suffer from the same defects . . . . If the Trade Descriptions Act were to be amended, Trading Standards Officers could achieve much more for the same input of resources. That would be good for the public, good for honest traders, and good for Local Authorities. There are many more examples of legislation which for no good reason is hampering the efficiency of the service and wasting precious resources because the legislation was either poorly constructed or is now out-dated."

The turning back of motor vehicle odometers ("clocking" offences as they are usually called) has been a widespread fraud for many years. For at least 10 years, dealers concerned to avoid responsibility under section 1

<sup>30</sup> Peter Green, Address to the Annual Conference of the Institute of Trading Standards Administration, Eastbourne, June 29, 1983.

of the Trade Descriptions Act, when some previous owner has manipulated the digits, have been able to do so by use of a suitable disclaimer notice. It was in 1974 that Lord Widgery L.C.J. in *Norman v. Bennett* stated<sup>31</sup>:

“ . . . where a false trade description is attached to goods, its effect can be neutralised by an express disclaimer or contradiction of the message contained in the trade description. To be effective any such disclaimer must be as bold, precise and compelling as the trade description itself and must be as effectively brought to the notice of any person to whom the goods may be supplied. In other words, the disclaimer must equal the trade description in the extent to which it is likely to get home to anyone interested in receiving the goods.”

So long as only a minority of car purchasers commission from one of the motoring organisations a full report on the condition of a used car before agreeing to buy or negotiating a price reduction and so long as purchasers rely very much in their purchase decisions on the mileage shown on the odometer (which, after all, may well be correct) it would be a counterproductive measure of consumer protection to require all traders to turn the odometer reading back to “0.”<sup>32</sup> (The purchaser would still be influenced by a whispered oral assertion about the mileage done.) Disclaimers are at least a warning not to rely on the mileage reading and I would regulate the sale of used cars further by legislation requiring the seller to display (inside the windscreen) a written report as to the

<sup>31</sup> [1974] 1 W.L.R. 1229, 1232; [1974] 3 All E.R. 351, 354.

<sup>32</sup> The author once took a different view: Borrie, *A Review of the Trade Descriptions Act 1968*, (1975) Crim.L.R. 662, 668.

condition of all used cars up to 10 years old.<sup>33</sup> It should state whether or not certain specified major mechanical and safety components require repair or replacement and whether or not the mileage reading has been verified. Failure to display the pre-sales information report would be subject to a penalty and the statement about the condition of the car would constitute a trade description so that any falsity in the statement would amount to an offence under the 1968 Act. The Motor Agents Association agreed in 1981 to a new provision in the code of practice it had negotiated with the Office of Fair Trading five years earlier whereby its members would display a pre-sales information report on the windscreens of all used cars available for sale. Unfortunately, only a minority of members is willing at the present time to comply, partly or mainly because they feel compliance will leave them in an unfair competitive position vis-à-vis non-members. It seems clear that self-regulation cannot be an effective substitute for legislation in this matter and legislation is needed that will be enforceable against all used car dealers, whether they are members of the Association or not.

One of the more intractable trading abuses of recent times has been the use of misleading price claims. The Trade Descriptions Act did attempt to deal with some of the more obvious abuses, such as *false* comparisons with a higher price that had been charged previously or with a manufacturer's recommended price.<sup>34</sup> Other types of misleading or uninformative "bargain offers," as they are often called, became common—"Worth £80; our price

<sup>33</sup> *Consumer difficulties in the used-car sector*, a report and recommendations made by the Director General of Fair Trading under s.2(3) of the Fair Trading Act 1973 (Office of Fair Trading, November 1980).

<sup>34</sup> Trade Descriptions Act 1968, s.11(2).

£50” or “Today’s value £42.50; our price £27.50” and comparison with a manufacturer’s recommended price, while literally true, might be highly misleading because the manufacturer’s recommended price was set artificially high and bore no relation to any actual prices being charged. Such comparisons were all examples of shading the truth and they distracted attention from what was helpful to the consumer seeking to shop around for a bargain, namely, specific comparisons with actual prices. The Price Marking (Bargain Offers) Order 1979<sup>35</sup> sought to ban such misleading price comparisons as those I have just referred to. It has come in for a great deal of criticism because of its complexity and uncertainty. It did serve its purpose of getting rid of many of the misleading price comparisons that had been common. Unfortunately they were succeeded by a large number of other equally and sometimes even more misleading comparisons such as “special order prices,” “after sales prices” and “ready assembled prices.”

This experience suggests to me that trying to deal specifically with current abuses through the medium of detailed regulation may be ineffective and self-defeating. We were firing at a moving target. It is really not feasible to try and cope with the apparently unending variety of trading practices in this way. The desire of some traders to con the public into believing that their prices constituted a bargain and their skill (or that of their advisers) in fulfilling that desire without contravening the specific provisions of the Bargain Offers Order were in no wise thwarted by this

<sup>35</sup> S.I. 1979 No. 364 amended by S.I. 1979 No. 633 and S.I. 1979 No. 1124. The ban on comparisons with recommended prices was limited to certain types of goods only: beds, domestic electric equipment, consumer electric goods, carpets and furniture.

kind of Government intervention. Certainly, some degree of specificity and precision in regulation is needed so that traders who want to comply are enabled to see as clearly as possible what is allowable in law. On the other hand, it seems to me there is a need to build into the legislation a degree of flexibility to deal with the exploitation of loopholes and with unforeseeable developments in pricing and marketing techniques. The present rules are not in one place—they are partly to be found in section 11 of the Trade Descriptions Act and partly in the Bargain Offers Order. What we need now is primary legislation to scrap all the existing rules and replace them by a general prohibition of misleading price comparisons followed by a non-exhaustive list of specific types of comparison that should not be permitted. I look to Australia and Canada<sup>36</sup> for my models. Section 53 of the Australian Trade Practices Act 1974 seems an excellent starting point:

“A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services. . . . make a false or misleading statement with respect to the price of goods or services. . . .”

That sort of provision has the advantage of not being confined to those particular types of misleading marketing the legislators happen to be aware of. I recognise that the generality of this sort of provision would be something of a novelty in the law. Experience suggests however that if the legislators are not to be outwitted, a fresh bold approach of this kind is needed. But so as to clarify as far

<sup>36</sup> Combines Investigation Act, s.36. A provision of this kind was first introduced in Canada in 1960 and has been amended since.

as possible, for the benefit of honest traders, and to take advantage of the experience of particular kinds of pricing techniques already known about, that general prohibition on mispricing should be followed by specific prohibitions introduced by such words as “Without prejudice to the generality of the above, . . . .”

I referred earlier to the inadequacy of fines imposed on traders convicted of offences under current consumer protection law. I commended the robust words of Lawton L.J. when he said that secondhand car dealers should be discouraged from taking chances on the accuracy of the mileometer readings on cars they proffer for sale by taking “all the profit out of the transaction and a good deal more.”<sup>37</sup> It is not a matter of asking for punitive or con-dign punishment. It is a matter of asking that the deterrent and preventive objectives and purposes of the law are not undermined by laughably inadequate fines that will deter nobody. I fear that too often the fines imposed have been inadequate. However, figures for 1976–80 suggest that there seems to have been a significant increase in the level of fines imposed following the revision of maximum fines in 1978 in accordance with the Criminal Law Act 1977. The average fine went up 84 per cent. in relation to convictions under the principal consumer protection statutes: Trade Descriptions Act, Food and Drugs Acts, Weights and Measures Acts, Fair Trading Act and Consumer Credit Act. Of course, that does have to be set against an increase of nearly 50 per cent. in retail prices over the same period.

The inadequacy of penalty has been particularly notice-

<sup>37</sup> *R. v. Hammerton Cars Ltd.* [1976] 1 W.L.R. 1243, 1251; [1976] 3 All E.R. 758, 765.

able in those cases where mileometer readings on cars have been turned back. Where a mileometer is turned back by 20,000 miles, some £500 is added to the sale value of the car, yet fines rarely match up to the extra profit made out of the offence. This is not good enough. It is an example of what the Advisory Committee on the Penal System were referring to when they said in 1970<sup>38</sup>:

“. . . it is felt to be an affront to public opinion and a positive inducement to crime if even when caught and convicted (the criminal) is still able to enjoy the proceeds of crime after he has paid the penalty imposed by the court.”

It may be that one of the reasons is that courts are not made aware by the prosecution of the level of profit that is made out of a transaction where a trader has falsely described goods sold. If magistrates lack some indication of the level of mischief caused by such an offence, they may understandably have difficulty in determining what is a fitting penalty. The Trading Standards Departments should give a lead in this matter of informing the courts of the facts of trading life because a firm policy on the part of the prosecution and a readiness on the part of the courts to be equally firm when guilt is established are essential if prosecution is to have a long-term effect on the trading climate. As Edmund Burke said, “For the triumph of evil, it is necessary only that good men do nothing.”

The prosecution also needs to take a lead in encouraging the courts to make full use of the Powers of Criminal Courts Act 1973 which enables a court that has convicted a trader to order compensation to be paid in respect of injury, loss

<sup>38</sup> *Reparation by the offender*, Report of the Advisory Council on the Penal System (Home Office, 1970), p. 3.

or damage caused by the offence in addition to any fine or other penalty imposed. This is a valuable power by which the criminal courts can see that justice is done to the victims of crime and the citizen, whose complaint leads to a conviction, can be recompensed for his or her individual loss without having to bring separate civil proceedings. Court time is saved and public opinion of the legal system is improved. In 1981–82, 94 compensation orders were made (average compensation £308) to those who suffered loss as a result of offences against the Trade Descriptions Act. It would be cold comfort for a person who has been misled by a trader about goods or services provided to find that, while the trader might be prosecuted and convicted, he—the consumer—could get no redress for the loss he had suffered, at any rate without pursuing his civil remedies.

Soon after the Act was passed, the Court of Appeal sounded words of caution to magistrates about the use of the Act. Lord Widgery L.C.J. said that a compensation order by the court of trial can be “extremely beneficial as long as it is confined to simple, straightforward cases and generally cases where no great amount is at stake.”<sup>39</sup> Convictions under consumer protection legislation are likely to be just that sort of case, and with a trader defendant, magistrates will not generally have the problem of worrying about whether he has means to pay. In 1979, the Court of Appeal stressed that a compensation order should not be made unless the sum claimed “is either agreed or has been proved.”<sup>40</sup> Clearly, the prosecution has a role here in trying to satisfy that requirement but more recently the

<sup>39</sup> *R. v. Kneeshaw* [1975] Q.B. 57, 60; [1974] 1 All E.R. 896, 898.

<sup>40</sup> *R. v. Vivian* [1979] 1 W.L.R. 291, 293; [1979] 1 All E.R. 48, 50.

Divisional Court has in any case modified the requirement by saying that there is no need for the sum claimed to be agreed or proved in respect of small sums claimed, for example, in respect of distress or anxiety.<sup>41</sup> It would be going too far to claim that, 10 years on from the introduction of these new powers, the appeal courts are any less cautious than they were in guiding magistrates on the use of them. Giving the criminal courts a power to award a civil remedy still seems something of a novelty. It was certainly a break with the traditional dichotomy of function between the criminal and civil courts. Yet, in the last few years there seems to have been some falling off in the number of compensation orders.<sup>42</sup> Surely it is timely for a little more boldness to be encouraged.

<sup>41</sup> *Bond v. Chief Constable of Kent* [1983] 1 W.L.R. 40; [1983] 1 All E.R. 456.

<sup>42</sup> The number of compensation orders made under the Trade Descriptions Act have been 194 (1978–79), 138 (1979–80), 107 (1980–81) and 94 (1981–82). The average amount of the compensation was £147 (1978–79), £173 (1979–80), £183 (1980–81) and £308 (1981–82).



#### *IV. Administrative Regulation*

1973 was a year marked by a number of imaginative ideas to strengthen the effectiveness of consumer protection, not least, if I may say so, by the creation of the Office of Fair Trading. I have already noted that 1973 saw the introduction of the small claims arbitration scheme in the county courts as well as the introduction of a power given to the criminal courts to award compensation for loss caused by victims of such offences as those prescribed for contravening the Trade Descriptions Act. The Fair Trading Act itself provided new powers going beyond the confines of the normal processes of the civil and criminal law.

Although the criminal law had been used effectively to control a number of trading abuses, there was always the problem that the penalties imposed by the courts for criminal offences might still leave the trader with a net profit out of his illegal activities. Precedents established that where criminal sanctions proved inadequate as a deterrent, the Attorney-General had power to seek an injunction in the civil courts to prevent the commission of further offences by someone who had been convicted time

and again and was flouting the law. In one well known case in the 1960s, *Attorney-General v. Harris*,<sup>1</sup> a husband and wife had 237 convictions between them under Manchester's Police Regulation Act 1844 arising out of their selling flowers in such a way as to obstruct the public's right of way. The Attorney-General obtained an injunction against them, the Court of Appeal pointing out that, although the courts were not bound to grant an injunction at the Attorney-General's request, they will normally grant his request, since he is primarily responsible for law enforcement. If, as indeed happened in this case, the injunction is disobeyed, those subject to it may be imprisoned for civil contempt of court.

Part III of the Fair Trading Act 1973 provides an analogous power for the Director General of Fair Trading. It applies only where traders have persistently broken the law to the detriment of consumers and the Director General is restrained from rushing into court proceedings by the requirement that court proceedings may only be taken after an intermediate stage in which a written assurance has been sought from the trader and the trader has either refused to give an assurance or has broken it. In exercising these powers, the Director General acts as a sort of specialised Attorney-General.

The novel powers in Part III of the Fair Trading Act apply not only to persistent breaches of the criminal law, such as the Trade Descriptions Act and the Food and Drugs Act, but also to persistent breaches of the civil law such as failing to do work contracted for or supplying goods which are not merchantable or not reasonably fit for

<sup>1</sup> [1961] 1 Q.B. 74; [1960] 3 All E.R. 207.

their purpose, contrary to the Sale of Goods Act. Where there are such persistent breaches of the law, the Director General of Fair Trading has a duty to use his "best endeavours" to obtain a satisfactory written assurance from the trader that he will refrain from breaking the law. If the trader declines to give a written assurance as to future conduct or, having given such, appears to have failed to observe it, he may be taken to court for an injunction against him. Breach of an injunction is of course a contempt of court. Because companies can, and frequently do, go out of business, the value of a written assurance in the name of the company is limited. When the company dies, so does the assurance. Hence the value of sections 38 and 39 of the Act whereby a "director, manager, secretary or other similar officer" of a company or a person with a controlling interest in a company can be required to give a written assurance if he has given his consent to or connived at persistent breaches of the law to the detriment of the consumer. If an individual closes down one business and opens up a similar one, he is still bound by his promise to behave. Some 400 written assurances have been obtained under Part III of the Fair Trading Act and they range from car dealers to men's shops, from restaurants to home improvers and from small local traders to major companies. There has only been a handful of cases before the courts, but that is to be expected. Because of the underlying sanctions, a written assurance itself normally achieves the desired results, by which I mean either trading standards are improved or the trader decides he had better leave the field for a less demanding vocation. The first time that a trader was committed to prison for contempt in disobeying an order made under the Fair Trading Act was in August 1983 when the Weston-super-Mare

County Court sent a double-glazing supplier to prison for 14 days.<sup>2</sup>

A very different and apparently quite unrelated duty imposed upon the Office of Fair Trading by section 124 of the Fair Trading Act is to encourage trade associations to prepare, and to disseminate to their members, codes of practice for guidance in safeguarding and promoting the interests of consumers. I have discussed two particular features of such codes already—the ways in which they have helped to improve contract terms and their provisions for conciliation and arbitration facilities. Codes also supplement the law by helping to raise standards of trading in such matters as the provision of more information (including price information) to customers and pre-testing arrangements for goods. To adapt the words of a well-known advertisement for beer, codes are meant to refresh those parts of business life that laws cannot reach.

Ten years' experience of both Part III of the Fair Trading Act and of codes of practice promoted under section 124 of the same Act suggests that these provisions could usefully be combined so that Part III could be applied (indirectly at least) to persistent breaches of codes as well as to persistent breaches of the civil and criminal law.

I believe that codes have several advantages over legal

<sup>2</sup> Office of Fair Trading Press Release, August 23, 1983. The defendant had first been brought before the Court in 1977 after he broke an assurance of future good conduct given in 1976. The court then ordered him to cease committing breaches of contract with customers by failing to carry out work or supply materials which he had agreed to do, failing to do work in a proper manner and failing to return customers' money when he had not done the work for which he had been paid. He was brought before the court again in July 1982, for failing to obey the court order. The court accepted certain undertakings, but the defendant was later sued successfully for failing to install windows or return money paid in advance and thereby broke the undertakings given to the Court.

regulation: they are more flexible, can be readily revised, and responsibility for enforcement rests with those who have close knowledge of the trade, *i.e.* the trade association council or disciplinary committee. Many practices can be dealt with, for instance lack of clarity in documentation, delays in servicing, or periods of time for which spare parts for appliances will be available, which it may not be feasible to cover by the precise wording appropriate to legislation. Codes do however have particular weaknesses and they are implicit in the very nature of self-regulatory codes negotiated with trade associations: difficulty of enforcement and non-applicability to those traders who are not members of the relevant association. Enforcement depends on discipline by the trade association itself and the role of enforcement does not always sit well with the trade association's quite different role as representative and advocate for its members in its dealings with Government and the public. It is especially difficult if exclusion from membership is not perceived by members as either a likely occurrence or as a deterrent. The other weakness of codes, their non-applicability to non-members, is self-evident. It is a weakness which is serious for the consumer who happens to deal with a non-member and it is a matter of resentment for trade association members that other traders appear to be competing unfairly because they are free from the restraints of the code.

One possible way forward would be to create by statute a general duty to trade fairly in consumer transactions, a duty which would be enforceable only through detailed codes of practice prepared by the Office of Fair Trading for each sector of trade after consultation with relevant trade associations. Under Part III of the Fair Trading Act, persistent breaches of the new statutory duty (and

indirectly, therefore, persistent breaches of the codes) could result in assurances or court orders and the codes would of course apply to all traders and not just those who belonged to relevant trade associations. The indications are that a legal development of these lines would find support among both consumer bodies and retailer organisations. Consumer bodies would welcome the wider scope and strengthened authority of codes of practice. Retailer organisations would also welcome the wider scope of the codes so that they covered traders who are outside the trade associations. The Motor Agents Association, for example, has many times stressed the unfairness involved in expecting its members to conform to higher standards of trading, such as providing customers with pre-sales information reports on used cars, when their non-member competitors are under no such obligation.

It is of interest to note that in the State of Victoria in Australia the Director of Consumer Affairs may seek an order in the Market Court (a specially constituted court) when a trader has "repeatedly" engaged in "conduct that is unfair to consumers." Section 15 of the Market Court Act 1978 (which was amended in 1980) lists various alternative types of conduct that are deemed to be unfair under the Act and the order that the court may make is one prohibiting a trader from engaging in such conduct. An alternative type of court order is one prohibiting the trader from entering into contracts unless they comply with terms specified by the court. A deed of assurance from a trader that he will refrain from unfair conduct is provided as an alternative to a court order. The types of conduct deemed to be unfair to consumers are listed in section 15 of the Act and apart from breaches of the civil or criminal law which obviously parallel the provisions of Part III of

our Fair Trading Act, other types of conduct listed as “unfair” cover misleading conduct, the taking advantage of the consumer, having regard for example to his age or level of education, and offering terms of contract that no reasonable person would regard as just.

Under my proposals, what types of conduct should be treated as “unfair” would be set out in codes of practice devised after consultation with relevant trade associations. It would be a matter for discussion whether such a code should receive the imprimatur of Parliament or the appropriate Minister before it became effective and whether, for example, breach of the code should be enforceable not only by the Director General of Fair Trading but also by any private individual who could show loss or damage arising from such breach.

The statutory imposition of a general duty to trade fairly would be a bold step and, by being directly linked to codes of practice in the preparation of which trade associations would have an important part to play, a novel dimension of democracy would be introduced because those directly affected would have a say (through their representative organisations) in the details of the rules that are to be applied to them. Yet it would not be a complete innovation. Section 6 of the Health and Safety at Work Act 1974 imposes a general duty (with criminal sanctions) on anyone who designs or manufactures articles for use *at work* to ensure, so far as is reasonably practicable, that the article is safe and the Health and Safety Commission has power to approve and issue codes of practice for guidance as to the carrying out of such general duty. Failure to observe the code is not in itself an offence but is admissible as evidence of the commission of a criminal offence in respect of breach of the general duty. In

1976, the Government issued a Consultative Document on Consumer Safety which put forward the idea of a comparable general duty in respect of the supply and servicing of goods *for consumers*. I quote<sup>3</sup>:

“The Government invites views on the proposal that any manufacturer, importer or trader should be guilty of an offence, if he is shown not to have exercised due care to satisfy himself that, so far as is reasonably practicable, the goods he supplies are safe when properly used for their intended purpose, or that any servicing he carries out on any goods does not render those goods unsafe.”

The Consultative Paper doubted whether the creation of a new offence was justified and there are likely to be more objections to the creation of a criminal offence phrased in broad general terms than to the creation of a general duty where enforcement is by a public official seeking assurances or orders in the Civil Courts.

A potentially much more drastic administrative control than Part III of the Fair Trading Act was introduced by the Consumer Credit Act 1974 in order to supplement both the civil and criminal sanctions provided in the Act to deal with the many malpractices that had been common in the field of consumer credit and to underpin the many new rights and obligations that the Act itself created. Any business which lends money or provides credit for consumers as well as all those who introduce people to a source of credit (including car dealers and many other categories of retailer) and other so-called ancillary credit businesses, such as debt collectors, must hold a licence from the Office of Fair Trading. And the key provision of

<sup>3</sup> Cmnd. 6398, February 1976, paras. 79–84.

the Act says that before a licence is granted the applicant must show he is “fit” to engage in the activity for which the licence is required.<sup>4</sup> Among factors which may be taken into account are whether the applicant has committed any offence involving dishonesty or violence, contravened any provision of the Consumer Credit Act or other consumer protection legislation or—and this is remarkably broad—has engaged in any business practices that are “unfair or improper (whether unlawful or not).”

The number of applications for licences has been over 150,000 since licensing began in 1976. There have at times been serious delays in handling these applications because administrative resources have not always matched demand and fees are currently £150 for a partnership or company and £80 for a sole trader (with additional sums of £10 for each additional category of business applied for). Licences are for 10 years but monitoring for fitness is a continuing process because, once granted, a licence may be revoked or suspended or varied at any time if information or complaints establish that the licensee is not “fit” to continue to hold a licence. Clearly, licensing is a considerable administrative and quasi-judicial exercise and, many would add, a considerable burden on commerce. The question must be asked: is it a necessary or desirable method of administrative control?

It is of course a preventive measure. Instead of waiting for unscrupulous credit dealers to cause harm, the idea is that they should be weeded out so that harm will not be done. Of course if competition worked in a way that approached the Adam Smith ideal, competition itself—market forces—would weed out the undesirable.

<sup>4</sup> Consumer Credit Act 1974, s.25.

Professor Paul Fairest, lecturing to Trading Standards Officers in 1982, disposed of that possibility<sup>5</sup>:

“The inadequacy of the ‘free market’ solution in this of all contexts must be manifest; the ‘free market’ solution assumes a consumer of perfect wisdom equipped with perfect information and able to take advantage of total freedom of choice. In the credit field, of all fields, this idealistic solution could not be further from attainment. Here ignorance abounds and consumer credulity is the main arm of the unscrupulous.”

It is the seriousness of public harm from uncontrolled trading in the credit field and the inadequacy in practice of civil and criminal remedies that justify the larger measure of control embodied in licensing. Similar reasoning explains why we have driving licences, licences for dealers in shares and licences for those who sell wines and spirits. But the licensing of occupations is clearly open to abuse if the licensing is done by members of the occupation themselves and an earlier Hamlyn lecturer, Professor Harry Street, showed that many licensing schemes fail to keep up with the times or are introduced merely for administrative convenience. “We must be very careful,” he said, “not to allow interference for no good reason. We do not want to be regulated unless it makes us better off.”<sup>6</sup> I believe the case for licensing in the consumer credit field is a strong one. It was well argued in the report of the

<sup>5</sup> Professor Paul Fairest, “Credit, Credulity and Credibility,” 1982, John O’Keefe Memorial Lecture given at the Annual Conference of the Institute of Trading Standards Administration, June 15, 1982.

<sup>6</sup> Professor Harry Street, *Justice in the Welfare State*, (Hamlyn Lectures, 1968) p. 78.

Crowther Committee in 1971<sup>7</sup> and I believe that experience of the working of licensing demonstrates that we are significantly “better off” with licensing than we would be without it. Professor Street had some strong things to say about licensing bodies often not giving reasons for their decisions or failing to comply with the rules of natural justice or there being no right of appeal. The Consumer Credit Act and regulations made under it have taken good care to draw the sting of any criticism of licensing on these grounds.

The present licensing system for consumer credit was designed to avoid the very serious shortcomings of the licensing system applied to moneylenders by the Moneylenders Act 1927. Under that decentralised system an annual licence had to be obtained from the local authority—it was known as the licensing authority—but, before a licence could be issued, a certificate authorising such issue had to be obtained from the magistrates court. Once a certificate was obtained the issue of the licence was automatic on payment of the prescribed fee. A variety of exemptions were provided for and enforcement was almost non-existent. Professor Goode, a member of the Crowther Committee, said that although it was likely that there were a great number of illegal moneylenders in the country, prosecutions were very infrequent.<sup>8</sup> The Home Office, which had the general superintendence of money-lending, appeared not to be active in initiating prosecu-

<sup>7</sup> Report of the Committee on Consumer Credit (Chairman: Lord Crowther), Cmnd. 4596.

<sup>8</sup> R.M. Goode, “The Legal Regulation of Lending,” paper presented to a conference on Instalment Credit Law organised by the British Institute of International and Comparative Law, 1968, published as Chapter 3 of *Instalment Credit*, edited by Professor Aubrey L. Diamond, 1970.

tions, while the licensing authorities prosecuted only in respect of the revenue offence of failing to pay for the prescribed excise licence and were not concerned with the conduct of a moneylending business. It seemed, therefore that enforcement was left to the occasional initiative of a police officer. Even more striking was that although a court which forfeited or suspended a certificate authorising the issue of a licence was required to notify the relevant licensing authority, out of 168 licensing authorities from whom Professor Goode obtained figures, only one, Grimsby, had a record of any court order in the previous 10 years to forfeit a certificate. In the same period there was only one instance, in Swansea, of a suspension of a certificate being notified to a licensing authority. Not surprisingly, Professor Goode was a leading advocate of a more comprehensive and centralised system of licensing.

When the Crowther Committee examined the inadequacies and complexity of existing controls over all the various forms of consumer credit, it favoured the creation of an overall framework covering all types of consumer credit transactions with additional provisions as necessary for certain transactions. Its basic approach was that the law should treat all who grant consumer credit as far as possible in the same way, including in respect of licensing. The many abuses it sought to combat included high pressure sales techniques (especially doorstep canvassing for and the selling of credit), inadequate pre-contract information, oppressive and unfair contract terms, lack of any rebate on early payment by the debtor, and extortionate credit bargains. They recommended a range of remedies for breach of the new obligations that would be created. Inevitably, enforcement would depend to a large degree on the initiative of the individual but the Crowther Com-

mittee recognised that the efficacy of the various protective methods they suggested for dealing with credit trading abuses was in practice limited by the fact that a single individual may be unaware of his legal rights or be unable or unwilling to exercise them. It then went on to say<sup>9</sup>:

“ . . . the more unscrupulous type of credit grantor may well take the view that the occasional check on his malpractices by a determined consumer in an isolated transaction is not a serious deterrent, and is outweighed by the financial advantages he may derive from evading the law. There is thus a need for an agency entrusted with the continuing supervision of consumer credit grantors, with power to investigate trading practices, require production of accounts and records and, in the case of serious malpractice, suspend or revoke the offender's licence.”

Professor Goode has since put the point both clearly and bluntly<sup>10</sup>:

“No consumer legislation, however sophisticated, is likely to have more than a marginal impact if it is not underpinned by effective enforcement machinery. The Hire-Purchase Acts provided no mechanism

<sup>9</sup> *Ibid.* para. 6.3.3.

<sup>10</sup> Professor Roy Goode, *Consumer Credit Legislation*, 1980, p. 1/103. A similar view was expressed in 1972 by a Committee of the Law Council of Australia in a Report to the Attorney-General for the State of Victoria on Fair Credit Laws, para. 3.5.1:

“the experience of centuries has shown that the best way of excluding the sharp and dishonest from an area of enterprise while leaving the fair and honest to carry on their activities without an unwieldy burden of detailed regulation is by a licensing scheme fairly and openly administered. The system has been widely applied to lawyers, doctors and other professional people, to moneylenders, finance brokers, estate agents, banks, life insurance companies and many others.”

whatever for systematic enforcement. The onus was placed on the individual consumer to take the initiative in invoking the Acts. In many cases he was not equipped to do so, through ignorance of his rights, timidity or inability to incur the legal costs that might be involved. The reputable trader or finance house would endeavour to comply with the law. The less scrupulous creditor, against whose activities the legislation was primarily aimed, could afford to cock a snook—provided he stood clear of the small number of criminal offences provided by the statutes—since at worst he would lose the occasional case, and this loss was far outweighed by the benefits to be derived from diligent and persistent flouting of the statutory requirements and the recovery from uninformed debtors of sums which they could not legally have been compelled to pay.”

I have already shown how extremely broad are the “fitness” provisions of the Consumer Credit Act. Licensing action, in the sense of issuing a provisional notice that a licence is to be refused or revoked, a “minded to refuse” notice as it is called, may be taken, *inter alia*, in respect of breaches of any provision of the Act itself irrespective of whether a criminal or civil sanction is specifically provided for. Whether such provisional action is followed, after written and/or oral representations, by a final adverse determination or by a favourable decision which may be coupled with an informal warning letter as to future conduct, obviously depends on the final view that is taken by the Office of Fair Trading. Examples of breaches of the Consumer Credit Act leading to licensing action are convictions under the Act for issuing unsolicited credit cards to consumers and for canvassing cash loans off trade

premises without prior written permission. Convictions under other legislation, whether in relation to behaviour in credit transactions or outside the credit field but indicative of the trader's likely general behaviour, may also lead to licensing action. Examples of the former have been the conviction of a moneylender under section 15 of the Theft Act for fraudulently obtaining money from a finance company by supplying false information and the conviction of a creditor under section 17 of the Theft Act for knowingly falsifying hire purchase agreements. Examples of licensing action following convictions outside the credit field include the conviction of a garage owner for six offences of fraud on the Inland Revenue and a conviction under the Road Traffic Act for supplying motor vehicles in a dangerous condition. Not surprisingly perhaps, used car dealers attract more adverse decisions than any other group of traders, with falsification of mileage readings the principal cause. Licensing action may of course be taken in respect of non-criminal conduct such as supplying goods that are not of merchantable quality, failing to carry out repairs properly, using misleading or unfair exemption clauses and so on.

I have sought to show that there is real value in having some sort of centralised control of the consumer credit industry so that those who seriously offend against the letter and spirit of fair dealing can be eased out. But that is not sufficient to justify a *positive* licensing system of the kind that exists as distinct from a power to exclude those who are proved to be unfit—a *negative* licensing system, as it is sometimes called. If the positive licensing system were ineffective because many traders tended to operate outside it or if there were no preventive value in subjecting traders to the initial hurdle of applying for a licence,

we might do just as well with a system of negative licensing or a power to make prohibitive orders to stop traders continuing to trade in future which is indeed the system operated under the Estate Agents Act 1979.

In the nature of things, one cannot be certain to what extent there is unlicensed trading in the credit field. I believe that in general, any unlicensed trading is minimal and due largely to inefficiency or inadvertence. An important factor in the licensing of credit brokers, *i.e.* traders who introduce customers to finance houses and other sources of finance, is that to some extent the licensing scheme is self policing. This is because the finance houses are unable to enforce credit agreements made with consumers through the agency of an unlicensed credit broker. Creditors who at one time may have used credit brokers with little thought as to whether they had sufficient integrity, or knowledge or were sufficiently reputable intermediaries, will now in their own interests ensure that their brokers are licensed and they also have an interest that their brokers do not engage in conduct that may make them likely candidates for revocation action. The number of convictions for unlicensed trading was 25 in 1980, 20 in 1981 and 13 in 1982. In the lending of small sums of money, there are often allegations of unlicensed trading but little hard evidence. It has to be admitted that those exploited by aggressive and furtive unlicensed moneylenders in the poorer areas of London or Manchester or Glasgow are not likely to be very forthcoming in providing such evidence, but some such moneylenders may not be legally required to have a licence because they are not lending by way of business or may only be lending amounts of less than the minimum figure for which a licence is required. There is a grey area on the

borderline of illegal unlicensed trading and any system of control is unlikely to be 100 per cent. effective. One of the more obvious gaps in protection against a dubious money-lender is that the lack of anything known against him may enable him to obtain a licence and, when thereafter evidence comes to light of his strong-arm methods of debt collection or his use of social security books as collateral or other illegal or unfair trading practices and a "minded to refuse" notice is served upon him, he is able to put off the moment when the axe falls in terms of his licence being revoked by using to the full the procedural rights given to him by the Act. He has a period of time in which to make written and oral representations; he can seek an extension in the statutory time limits on grounds that may seem plausible; even when an adverse determination is made he has a right of appeal against it. Many months can pass during which he is legally entitled to continue his nefarious activities. But that is the price that has to be paid for natural justice and fairness in procedures which are the hallmark of a civilised society governed by the rule of law. The alternative of an arbitrary power to strike at traders who are believed to be behaving improperly would surely be unacceptable.

Subjecting traders to an initial vetting does seem to be of value in debarring traders from the credit field before they can do harm. During the 1981-83 period some 60 per cent. of the cases investigated by the Office of Fair Trading for fitness, and some 60 per cent. of those cases where formal licensing action was taken, arose from applications for a licence as distinct from matters arising during the currency of the licence. Further, awareness on the part of traders that there is an initial fitness test no doubt acts as a self-operating filter because, by using their own judg-

ment on the likelihood of success if they apply for a licence, they may decide not to trouble to apply. The forms that applicants have to fill in include questions requiring disclosure of convictions for offences involving fraud, dishonesty or violence, convictions under a wide range of consumer protection legislation and disclosure of bankruptcy. Of course, some applicants will give a false answer to the questions, despite that being a criminal offence, but it is doubtful whether deliberate non-disclosure is common and in any case is readily discovered either because of the system of reporting of convictions to the Office of Fair Trading or because publicity given to the grant of a licence will reveal the truth.

The decision on whether an applicant is a "fit person" is made after consideration of information already held by the Office of Fair Trading, information provided by applicants themselves in their application forms, and information supplied by local authority Trading Standards Officers. Frequent use is made of the power in section 6 of the Act to require applicants to provide further information. After consideration of all the available material, some applications on which there is adverse information are granted on the basis that the material is not sufficient, or too old, to warrant refusal of the application. In other cases, a licence may be granted but a letter is sent warning the applicant that because of past misbehaviour he is in effect on probation and repetition of past misbehaviour is likely to lead to the institution of revocation procedures. Where material is sufficiently serious and up to date, a "minded to refuse" notice will be issued.

Asserting the value of the positive licensing scheme is not to claim that it ensures that there are no longer any rogues in the credit field. There is little doubt that some traders

obtain licences when they are not “fit” to have them but information against them is lacking or insufficient. What is claimed is that the initial check on applications, which is the special feature of positive licensing, has positive advantages. In addition of course, the licensing system involves the possibility of revocation or suspension during the currency of the licence. Both by formal action and informal action the licensing system has, I believe, been effective in raising standards of trading in the credit field. Of course it imposes some burdens on the businesses affected and, like any regulatory system, it has a cost. The direct costs to commerce and industry are those incurred in applying for a licence, submitting information and paying the appropriate fees. During the currency of a licence the trader has to identify changes in the particulars related to that licence and may need to apply for a variation to take account of changed trading activities. Credit grantors taking business introduced by credit brokers must ensure that the credit broker is licensed, otherwise the relevant agreement may be unenforceable. For the large generality of traders, the compliance costs are unlikely to be significant and the industry benefits from the operation of a licensing system which helps to ensure higher standards of trading and thereby fairer conditions of competition.

If there is one serious weakness in the system, it is that the only ultimate sanction available to the licensing agency is revocation of a licence and, especially if consumer credit business is the sole or main activity of the trader, that sanction is equivalent to a death sentence. Of course informal pressures, persuasion and warnings can be used to modify malpractice and the licensing system does provide for suspension of a licence as an alternative to revocation. But the sanction of revocation may in some

instances seem too drastic, too draconian, to be a believable deterrent. It may, for example, be unrealistic to envisage that a major national company should be deprived altogether of its licence, thus putting an end to a considerable business (from which, it may well be, many consumers benefit) merely because of some minor misdemeanour or even for what are, taken individually, quite serious malpractices. Arguably there is room here for some intermediate power—a power, for example, for the licensing agency (the Office of Fair Trading) to apply to the court to compel the company to take specified action. In South Australia, the licensing agency may, as an alternative to suspending or cancelling a licence, reprimand licensees or impose fines not exceeding \$1,000.<sup>11</sup> Scottish local authorities were given far-reaching permissive powers of licensing by the Civic Government (Scotland) Act 1982. Second-hand dealers are one of the specified occupations that may be subject to licensing and if a local authority chooses to licence second-hand car dealers, every licensed dealer must keep a record of the mileage reading on the odometer when he acquired it. Contravention of this provision makes the offender liable to a fine of £200. Admittedly this is a penalty to be imposed by the courts, not by the licensing authority itself, but the possibility that the licensing authority will seek such a penalty is a useful deterrent weapon in its armoury.

If the licensing system introduced by the Consumer Credit Act has a rationale and a value in raising trading

<sup>11</sup> Consumer Credit Act 1972 (S.A.), s.36. Other Australian States have more recently followed suit: Consumer Credit Act 1981 (N.S.W.), s.180(8) and Credit Act 1981 (Vic.), s.212(3). See Ross Cranston, *Consumers and the Law*, (2nd ed., 1984) p. 367, who suggests that “a licensing system is deficient if it does not contain a gradation of sanctions ranging from the mild to the severe.”

practices and enhancing consumer protection, is there not a case for some such system in other fields? There seems to me to be two conflicting attitudes to this question. On the one hand, it seems that calls for licensing, registration or certification of particular occupations and types of trading abound. Sometimes the call comes from consumer organisations concerned about the low quality of products and services.

But often the call comes from occupational groups themselves—insurance men, car dealers, plumbers—inspired no doubt by commercial self-interest, but with objectives that arguably are in the public interest. On the other hand, controls of this sort are thought to be inevitably restrictive of competition, likely to create cosy clubs to the detriment of the public and run counter to the new spirit of deregulation. According to this latter school of thought, free competition is not only desirable in itself but it will operate effectively to freeze out the undesirable and see off the incompetent.

My view is this. Where competition works reasonably well there is no need for administrative regulation or, at any rate, its costs are not matched by clear benefits to the public. But competition can only work well if the customers have sufficient knowledge and understanding to choose and to discriminate between those who provide a safe and satisfactory service and those who do not or if customers use a service so frequently that, should they suffer once, the loss will be small and there will be no “repeat buys.” Where on principle some sort of regulation seems desirable, it is then a matter of considering whether in practice the costs are outweighed by the benefits. The public cannot be expected to know at a glance that a surgeon or a solicitor is safe or satisfactory but in this country

(and of course in most other countries), because the professions are regulated and because we know that surgeons and solicitors are subjected to exacting pre-entry controls as well as ethical and disciplinary requirements, we do have some assurance and some safeguard against fraud and incompetence. That is the classic case for regulation of the professions. The benefits are considerable because the risks of non-regulation are considerable and, since the controls are administered largely by the professions themselves within a framework of statute, the costs are borne by the professions. Nowadays the public deals with many occupations whose practitioners are operating in a highly specialised or technical sphere which makes it so difficult for the public to be able to assess their integrity or competence. Hence the controls over competence that exist in relation to para-professional as well as professional groups, and all kinds of people from driving instructors to hairdressers, insurance brokers to veterinary surgeons, with a mixture of statutory regulation and self-regulation, the mixture owing more to historical accident than rational policy.

But there are no regulations to ensure competence in such fields as investment advice, estate agency or plumbing. Let me consider each of these three categories in turn. The case for a test of competence for investment management and advice has been well made out by Professor Gower in his *Review of Investor Protection*. He suspects that more investors have suffered from the incompetence of their advisers than from their dishonesty and, no doubt tongue in cheek, adds<sup>12</sup>: "I would have thought that the ability to read and write and, indeed,

<sup>12</sup> Professor L.C.B. Gower, *Review of Investor Protection*, A Discussion Document (H.M.S.O. 1982), para. 9.19.

something considerably more, is needed and should be demonstrated.”

As to estate agents, section 22 of the Estate Agents Act 1979 provides that regulations may be made prescribing minimum standards of competence for those engaged in estate agency work. No such regulations have in fact been made although of course many estate agents are members of professional bodies that require specific qualifications. The view of both the Labour Government at the time the Act was passed and the subsequent Conservative Government was essentially that until a need for standards of competence is demonstrated, no regulations should be made. As one Government spokesman put it, no move whatever should be made which would create “a closed shop, an exclusive organisation, that would prevent any kind of competition.”<sup>13</sup> The fact is that it is not at all obvious what are the minimum standards necessary or desirable for an estate agent to have when handling a typical private house purchase. It would certainly be going well over the top to require the standards of a qualified surveyor and perhaps hardly worth while to lay down a few rather basic requirements.

Lastly, plumbers. In theory it must be possible to lay down some basic requirements of knowledge and competence and training. But is it desirable? Those who have the misfortune to pay out not insignificant sums to incompetent “cowboys” who claim to be plumbers would no doubt like to have a list of suitably qualified plumbers whom they could reasonably rely upon, available in local council offices, public libraries or elsewhere. Perhaps the

<sup>13</sup> John Fraser M.P., House of Commons Standing Committee C (April 26, 1978), col. 109.

Institute of Plumbing should be encouraged to devise training and examination schemes to that end. But I doubt if this is a case for central government or local government control of any kind. The risks of loss from bad workmanship or incompetence are not as great as in either of the previous two examples, the creation of a closed shop would deprive householders of the choice that is now available (a choice that can be of vital importance in a winter emergency) and the bureaucracy required seems out of proportion to the need it is meant to serve.

What all this suggests to me is that some sort of licensing may be desirable to deal with widespread malpractice. That was and is the justification for licensing under the Consumer Credit Act. The negative licensing scheme operating under the Estate Agents Act is justifiable to deal with malpractice and potential malpractice there; the risks of loss to consumers is significant. Licensing or effective self-regulation is also useful in other fields in ensuring protection against financial malpractice or inadequacy which can result in serious economic loss to the consumer. This is because the regulatory requirements can incorporate professional indemnity insurance and guarantee funds, and can provide, therefore, a source of compensation to the consumer when necessary.

When it comes to justifying licensing or regulation from the point of view of ensuring minimum competence, as distinct from seeking to cope with malpractice, I believe a much stronger case needs to be made out. A balance has to be struck between the aim of protecting the public from incompetence on the one hand and the reduction in competition that control must bring about together with the costs of control on the other hand. As one commentator has observed, "a licensing scheme aimed at ensuring com-

petence in an occupation would be more costly than one designed to reduce fraud and exploitation.”<sup>14</sup> There will be a need for greater expertise in the licensing authority, more elaborate investigations and frequent revision of standards. Of course, the aim of striking a balance can lead to some modest form of control that may turn out to be somewhat ineffectual. I fear this may be the case with the Insurance Brokers (Registration) Act 1977. Since that Act anyone, whether registered or not and whether he fulfils any requirements of competence or not, may act as an insurance intermediary. The occupation of insurance intermediary is open to anyone as it was before. However, such an intermediary may only call himself an “insurance broker” and use that description if he is a duly registered broker and fulfils all the requirements of the Act and the regulations made under it. If the public is aware of the particular significance of someone calling himself an “insurance broker” (which is a big “if”) there is value in the Act because the public has some assurance of integrity and competence. But not all intermediaries of integrity and competence have sought to become registered insurance brokers; they may call themselves insurance consultants, insurance advisers, or whatever they choose. And there are some intermediaries of no particular integrity or competence who also call themselves insurance consultants, insurance advisers or whatever and it is really quite impossible for the public to discriminate between them. Professor Gower recommends that no one should be allowed to carry on business as an insurance intermediary

<sup>14</sup> A.J. Duggan of the University of Melbourne, “Occupational Licensing and Related Forms of Control,” a paper presented to the Workshop on Regulation and Deregulation organised by the Australian National University, Canberra, August 1981.

except someone who has gone through the necessary hoops to become registered with the Insurance Brokers Registration Council.<sup>15</sup>

I think Professor Gower is right, and our experience in this country since the Insurance Brokers (Registration) Act suggests that when we try to strike a balance between the need for controls to protect the public from incompetence and the reduction in competition that controls bring about, we must boldly come to a clear-cut solution: either no controls or controls combined with an exclusive right to engage in the regulated occupation. In 1972, a Government-appointed committee under Mr. Justice Forbes's chairmanship reported its view on proposals for the registration of building contractors.<sup>16</sup> The Forbes Committee came down firmly against any attempt to introduce the compulsory registration of builders. I think the Committee may have been somewhat complacent as to the level of consumer satisfaction about household repairs and maintenance work, and of course the amount of home improvement work commissioned in the years since 1972 has increased in both quality and range. But the Committee's principal conclusion seems a valid conclusion for today. This was that, even if compulsory registration achieved some improvement in building standards, it was unlikely that any benefits would be commensurate with the costs incurred in setting up and operating the scheme, and the Committee could not see how the administrative difficulties involved in keeping it up-to-date could be overcome.

<sup>15</sup> *Ibid.* para. 9.06.

<sup>16</sup> Department of the Environment, *The Registration of Builders*, Report of an Enquiry under the Hon. Mr. Justice Forbes (H.M.S.O. 1972), p. 21.

There are now some 200,000 firms of builders registered for V.A.T., an unknown but probably high proportion of that figure enters and leaves the industry every year and the vast variety of work encompassed by the phrase "home improvements" means that the organisation of tests of competence and quality would be a most complex exercise. It follows that, in my view, building work even for the inexperienced household must be left to market forces modified only by such programmes of information, advice, redress and indemnity schemes that Government and trade associations can helpfully devise. A measure of responsibility should lie upon local authorities and building societies who, after all, have knowledge that no householder can match and who so often provide the grants and loans which pay for small building work. They should make available lists of recommended builders with general or specialist competence and having, of course, adequate indemnity cover against loss.

My conclusion is that licensing schemes, whether of the positive or negative variety, for the benefit of the consumer, should be seen as useful devices underpinning other forms of legal control. They should, however, be used selectively. Experience suggests that licensing should no more be regarded as a panacea than any other measure of consumer protection.



## *V. Consumers and the European Community*

Consumer organisations were among the most enthusiastic supporters of Britain's entry into the European Economic Community on January 1, 1973. They believed that the creation of a Common Market would enable the British consumer to enjoy the products of European farms and factories without restriction. Tariff barriers would come tumbling down and the consumer would be able to choose freely from a rich cornucopia of goods and services. There would be ready access to well designed Italian clothes, low priced French wine, and high quality German cars.

Tariff barriers have of course come down, but they have often been replaced by governmental tax arrangements and distribution systems devised by private industry that have kept the European Commission in Brussels and the European Court in Luxembourg busy trying to combat both state and private efforts to keep up national barriers to competition and consumer choice. The achievement of the Common Market has not matched the ideal.

In July 1983, after many years of dispute, the European Court condemned the British Government's system of

excise duty on the ground that it overtaxed wine in comparison with beer thereby giving protection to British beer producers as against continental wine producers, contrary to Article 95 of the Treaty of Rome.<sup>1</sup> In cases earlier the same year, the Court likewise condemned the French and Italian Governments for protecting national drink manufacturers. In 1982, the Commission of the EEC took action against car manufacturers, under Articles 85 and 86 of the Treaty, because they had blocked the sale of right-hand drive cars on the continent for export to the United Kingdom, thereby helping to keep British car prices somewhere between 20 per cent. and 45 per cent. higher than on the continent.<sup>2</sup> The European consumer groups, through the Bureau Européen des Unions de Consommateurs (B.E.U.C.), had been in the forefront of the attack which drew attention to the substantial discrepancy between continental and British car prices as an affront to the whole concept of a Common Market.<sup>3</sup> Even the Community itself, through an agreement made in Tokyo in February 1983 has, according to a B.E.U.C. report, made a mockery of the Common Market through its deal with Japan whereby the import of video recorders has been limited.<sup>4</sup> Because the agreement required the Japanese not only to limit their 1983 sales but to sell them at stock prices no lower than the factory prices of European pro-

<sup>1</sup> European Court of Justice Case 1970/78, judgment given July 12, 1983.

<sup>2</sup> Commission of the European Communities, Twelfth Report on Competition Policy, 1982, p. 84.

<sup>3</sup> Report on car prices and private imports of cars in the European Community 2nd report (French/English), Brussels, B.E.U.C., 1982 Ref 105/82.

<sup>4</sup> Dossier on video tape recorder prices—B.E.U.C.'s position on the Tokyo agreement, B.E.U.C. News, volume 25, June 1983.

ducers, consumers in Europe are having to pay more than otherwise and their range of choice is reduced.

Not only did consumer bodies see benefits from the creation of one market and the idea of goods flowing freely without let or hindrance across the frontiers of Europe, they also looked to the Community to give a lead in more explicitly directed initiatives and much faith was placed in the specific programme for consumer protection that was approved by the Council of Ministers of the Community in 1975. And to the politicians and officials who were beginning to appreciate that the Community did not mean anything very practical or significant to the common man, such a programme was thought to help give the Community a human face. If the Community could be seen as bringing direct advantages to the housewife and the householder, and not just to the farmers and the industrialists, it might take firmer root as a meaningful concept to the ordinary citizens of Europe. "We must make the Community a practical reality in terms of everyday life," said Mr. Roy Jenkins, president of the Commission.<sup>5</sup>

The programme of the Community, described as a "preliminary" programme for consumer protection and information policy, was broad in its objectives and detailed in the action proposed by the Commission. It echoed the much quoted ideals pronounced by President John F. Kennedy on March 15, 1962: the right to safety, the right to choose, the right to be heard and the right to

<sup>5</sup> Roy Jenkins, address to the European Parliament, February 8, 1977, quoted in the Foreword to *Consumer protection and information policy*, first report, 1977, Commission of the European Communities.

be informed. The aims of the EEC's 1975 programme were listed as follows<sup>6</sup>:

- "A. effective protection against hazards to consumer health and safety;
- B. effective protection against damage to consumers' economic interests;
- C. adequate facilities for advice, help and redress;
- D. consumer information and education;
- E. consultation with and representation of consumers in the framing of decisions affecting their interests."

In 1981, the Council of Ministers adopted a second "action" programme. But what has been the achievement? In my view, the achievement has consisted of small advances in certain particular, usually technical respects; failure in each of the major initiatives taken, and the unfortunate putting back of a number of national initiatives that might otherwise have been implemented. In a speech to the European Parliament in February 1983, Mr. Ken Collins, chairman of the European Parliament's Committee on the Environment, Public Health and Consumer Protection, said<sup>7</sup>:

"It is ten years now since the Community established consumer policy as a legitimate part of its operations. Since then, the Commission, Parliament and Council have agreed two five-year 'action' programmes . . . seldom can any action programme have been so singularly lacking in any action. We have only two

<sup>6</sup> *Ibid.* p. 64.

<sup>7</sup> Reported in *Consumer Affairs*, vol. 61, January/February 1983, pp. 61-62. Mr. Collins seems to have been referring to the directives on cosmetics and food labelling.

Directives in place from the first programme and precious little other than hope and faith to show from the second—and that is a statement of some charity!”

Whatever political will may have existed in the Council of Ministers ten years ago for consumer protection, it seems to have quickly evaporated. Consumer organisations, politicians and Community officials probably agree on that though some may assert that patience will have its reward in due course. The optimistic may say that, some time in the future, the hard work and the sheer reasonableness and practical benefit of the proposals that have been worked upon and reworked upon over the years will pay off. Even the cynical may say that the problems of getting ministerial agreement among 10 or 12 diverse nations may be solved by some gentle diplomacy and trade-offs, with one country or group of countries agreeing to directive A if other countries will accept policy B. Not long ago, a writer in the *Financial Times* said,<sup>8</sup> “In almost every sphere of politics other than the European Community, a week is conventionally regarded as a long time.” It follows that I should not in these lectures try to come to any very firm conclusions or make any too definite predictions when the EEC’s consumer programme is not yet 10 years old and there is still time for disappointment to be replaced by renewed expectation. What I think is legitimate at the present time is to express a view as to the practicalities of consumer protection programmes at the Community level and to suggest what action at that level is justified and sensible.

My general conclusion is that the EEC Commission’s

<sup>8</sup> John Wyles, *Financial Times*, May 13, 1983.

consumer programmes have been much too ambitious—first, in their insistence on promoting directives containing detailed legislative provisions and, second, in seeking harmonisation and uniformity on topics where there is no real Community dimension. Not only has the Commission wrongly assumed a real political will to implement these detailed directives, they have paid little regard to differences in legal systems, the need for law reform to be built upon existing concepts so that it can be assimilated to the national law that has developed in the past, or the fact that different member states may have developed particular methods of doing business or different ways of regulating business in the general public interest that could be put in jeopardy by such directives. The fact of Britain joining the Community does not alter the fact of history that there is at least as much in common between Britain and Sweden, Britain and the United States let alone Britain and the Commonwealth in terms of culture, legal traditions and political institutions.

Of course Community officials must find Britain a very awkward partner in the Community. If a draft directive follows the German legal model, other Community countries whose laws are similar may well find it acceptable and Britain once more takes on the rôle of the odd man out. It is understandable that officials in Brussels, wanting the satisfaction of achieving a useful outcome to their work, see Britain in this light. Less understandable is the way in which Community officials treat the aspirations and objectives of the Treaty of Rome as if they are immediately attainable. They ought not to act as if the Community constituted a Federal Europe and they may achieve less in the way of consumer protection by doing so. Dr. A. H. Hermann has suggested that much of the EEC's paper

mountain is the product of EEC officials' frustration<sup>9</sup>:

"They cannot govern a federal Europe because there is no federal Europe. But they might serve the aim of European integration much better if they put this grand and distant task out of their minds for a while and instead applied themselves to the smaller tasks which might ultimately lead to it."

Within Britain, over-enthusiasm for the Common Market inevitably generated both disappointment and cynicism. At any rate, in the early days of our membership of the Community, British Euro-enthusiasts seemed to lose all sight of reality, like born-again fundamentalists with an unshakeable belief in their new religion. All manner of problems, including consumer problems, were thought to be amenable to a European solution. This was no more realistic or rational than the other extreme, expressed more recently by a *Guardian* journalist that "Europe is a set of rival tribes linked only by juggernaut lorries and the package holiday business."<sup>10</sup>

The most obviously useful EEC initiatives for the consumer have been directives that harmonise the rules of the different Member States on matters of safety, quality standards and weights and measures. It is a programme of direct relevance to the removal of technical barriers to trade between the states and the encouragement of free movement of goods and free competition. When the consumer is making his or her choice in the shops between different makes of electrical and electronic goods, toys, textiles, cosmetics or foodstuffs from different parts of the Community, clearly there is also a direct benefit if these

<sup>9</sup> A.H. Hermann, *Financial Times*, April 21, 1983.

<sup>10</sup> Peter Fiddick, *The Guardian*, July 29, 1983.

goods conform to common basic standards of health and safety and if they are sold according to common measurements and with adequate labelling. Prepacked goods of various kinds are now made up in the same quantities whatever part of the Community they come from, and useful directives have been adopted and implemented in relation to foodstuffs concerning durability dates, instructions for use and ingredient listing.

It is in pursuit of the declared aim of advancing the consumer's "economic interests" that Community intervention seems to have been misconceived. In the 1970s, the Commission prepared detailed directives for implementation by the Member States on many important matters: consumer credit, insurance, misleading and unfair advertising, doorstep selling and liability for defective products. Separately and collectively they have been criticised in Britain by both business and consumer interests and rightly so. I am all for boldness but not when it verges on the foolhardy. From Britain's point of view, I believe these directives fall into three categories: (1) irrelevant and irritating; (2) retrograde; and (3) well intentioned but damaging to national initiatives.

I put into the first category the directive on consumer credit. Protection of the consumer against unfair conditions and the various malpractices that are so prevalent because the consumer is particularly vulnerable in credit transactions has been the basis for national legislative measures in many countries in Europe and elsewhere. The Community proposal was announced in 1979, based on the assertion that differences in national provisions led to disparities in the degree of consumer protection in the Member States and "have an influence on the free movement of goods and services obtained on credit and thus

hinder the harmonious development of economic activities throughout the Community.”<sup>11</sup> Adoption of the directive was therefore said to be justified under Article 100 of the Treaty which imposes on the Council of Ministers a duty to issue directives for the approximation of such laws in Member States as “directly affect the establishment or functioning of the Common Market.” Yet, as Professor Goode has said, “the reasons for harmonising this field of law have never been very clearly articulated.”<sup>12</sup> So far as the British consumer is concerned, obtaining a loan from a French bank or arranging easy payments with a Dutch finance company does not seem a very immediate prospect. Moreover, our law was considerably revised as recently as the Consumer Credit Act 1974, after the detailed report of the Crowther Committee.<sup>13</sup> That Act, with 193 sections and 5 Schedules has also spawned secondary legislation in the form of detailed regulations on matters relating to quotations, documentation, rights of rebate and many other matters. The directive is simply irrelevant to the protection of the British consumer in the foreseeable future. Indeed, many of the provisions of the directive stem from the Consumer Credit Act though it is meant to provide only minimum standards and expressly states that Member States may lay down or retain more stringent provisions to protect consumers if they so wish. That at least is to be welcomed

<sup>11</sup> Preamble to the draft directive quoted by the House of Lords Select Committee on the European Communities, Session 1979–80, 8th report, *Consumer Credit*, H.L.(30), 1979, para. 2.

<sup>12</sup> R.M. Goode (ed.), *Consumer Credit*, U.K. National Committee of Comparative Law, 1978, p. 93.

<sup>13</sup> Committee on Consumer Credit (chairman: Lord Crowther), Cmnd. 4596, 1971.

because it means that Britain is not expected to repeal any part of the 1974 Act which is *not* covered by the Commission's proposal, in order to comply with the directive. Nonetheless, implementation of the directive would mean a number of amendments to the Act and this would be an irritating and tiresome consequence of the Commission's insistence on descending into unnecessary detail. For example, our carefully worked out exemption provisions would have to be altered and a clumsy proposal meant to protect those of us with overdrafts could, according to the United Kingdom consumer bodies, "end up by strangling the plant they are setting out to protect."<sup>14</sup> As the Finance Houses Association commented<sup>15</sup>:

" . . . if the directive were to go through in anything like its present form, the progress of the developing legislation in this country would be deflected into side channels which we do not consider to be realistic . . . our objection relates to areas in which it is imposing concepts which differ from the equivalent concepts which we already have in our own legislation."

Of course, there is value in extending the kind of protection United Kingdom consumers enjoy under the Consumer Credit Act to other European consumers, and some adjustments and inconvenience in Britain might be thought of as a small price to pay for enlarging the protection of millions of consumers in the countries of Southern Europe. But the provisions of the directive cannot be effectively implemented in countries that lack the basic framework for its enforcement and, in the present state of

<sup>14</sup> House of Lords Select Committee on the European Communities, Session 1979-80, 8th report, Consumer Credit, H.L.(30), 1979, evidence of the consumers in the European Community Group (U.K.), p. 29.

<sup>15</sup> *Ibid.* evidence of the Finance Houses Association, p. 17.

the Community's development, it is no good Community officials imagining they can act as surrogates for national authorities in the enactment and enforcement of detailed measures of consumer protection.

I put into my category of retrograde EEC directives, the one on insurance contracts proposed in 1979. In my view, the Law Commission got it right when in the following year it said that the result of the adoption of this directive in Britain would be "to freeze our law of insurance in an unsatisfactory state for an indefinite period and to prevent any introduction of domestic consumer legislation in the areas covered by it."<sup>16</sup> Since the eighteenth century, our courts have ruled that insurance contracts are contracts *uberrimae fidei* and the insured is required to disclose to the insurance company, before a contract of insurance is entered into, all "material facts," whether he has been asked about them, for example in a proposal form, or not. If he fails to do so, the insurance company is entitled to refuse to pay out on a claim. Unfortunately for the general public, the question of when a fact is a "material" fact is determined not by the standards and experience of ordinary people, but by the standards and experience of insurance companies. Is the fact one which *would* influence a prudent insurance company in deciding whether to provide insurance and what premium to charge? If so, it is a material fact. Many insurance companies have not been content with their favourable treatment under the law in this respect—they have sought to require the potential insured to complete detailed proposal forms and to warrant and guarantee that every answer given to the questions on the form are cor-

<sup>16</sup> Law Commission, *Insurance Law Non-Disclosure and Breach of Warranty* (Law Com. No. 104), Cmnd. 8064, 1980, para. 1.18.

rect. Every answer is then a potential trap for the insured, because the insurance company can escape liability on a policy if any such answer was untrue even if the truth was not known to the insured or was not material to the risk insured against. If Mrs. Brown seeks life assurance and answers "Yes" to the typical question: "Are you now in good health and free from any physical defect or disease?" the insurance company need never pay out if in fact Mrs. Brown was suffering from cancer at the time of the proposal even though she had no reason to know she had the disease and irrespective of whether Mrs. Brown dies of the disease or from some quite different cause. If a motorist with a comprehensive policy on his car fails to comply with a warranty that he will maintain his car in a roadworthy condition, and the car is then stolen, the insurance company is entitled to avoid liability.

In 1977, following the amazing exemption for insurance companies from the impact of the Unfair Contract Terms Act, the companies agreed in a series of statements of practice that they would not unreasonably repudiate liability if a false answer was not material, or if the loss was not connected with the false statement. In relation to the example I have just given, a claim following Mrs. Brown's death would not be rejected if the fact of existing disease was outside Mrs. Brown's knowledge. Clearly, these statements of practice, which were issued by the insurance company associations and Lloyd's, go some way to remedying the defects of the law but the Law Commission pointed out in their 1980 report that they do not remove the need for legislation.<sup>17</sup> They have no legal effect and the liquidator of an insurance company would be bound to

<sup>17</sup> *Ibid.* paras. 3.27 to 3.30.

disregard them. Moreover, the insurer is the sole judge of whether rejection of a claim is reasonable or unreasonable and not every insurance company is a member of one of the associations that issued the statements of practice.

The Law Commission proposed a major scheme of reform and put forward a draft Bill with the aim of eliminating the deficiencies in the law of non-disclosure and breach of warranty. Among the key recommendations, it proposed that a fact should only be regarded as a "material" fact if it is one which a reasonable man in the position of the potential insured would disclose to his insurers; proposal forms should contain a warning to the insured concerning his duty of disclosure; the standard expected when answering questions on a proposal form should be to answer them to the best of one's knowledge and belief; and no term of an insurance contract should be capable of constituting a warranty unless it is material to the risk.

Now all this is very helpful in seeking to redress the imbalance that has long existed in the law between the interests of the insured and the insurer. The provisions of the EEC directive, on the other hand, would do little or nothing to remedy the defects in our existing law and are themselves defective. That is the view of the Law Commission and they have backed it up with forthright and persuasive argument. The key provision of the directive is Article 3. Modelled on French law, it imposes a wide duty of disclosure on the insured but provides for partial recovery of the insured's claim in some cases if the insured fails to fulfil that duty. The duty of disclosure seems even more onerous than under our present law because it requires an applicant for insurance to disclose all facts of which he is aware that *may* influence the *actual* insurer's assessment or acceptance of the risk. As a well known broker has put

it<sup>18</sup>: “How on earth does the policyholder know what would influence that particular insurer’s assessment of risk?”

The possibility of partial recovery if the insured fails to comply with his duty of disclosure sounds beneficial—the insurer may have to pay out such proportion of the claim as the premium paid bears to the premium the policyholder would have paid if he had declared the risk correctly. The “proportionality” rule, as it is called, would however only apply where the policyholder “may be considered to have acted improperly,” which seems to be an uncertain sort of grey area of conduct that lies somewhere between innocence and fraud. Then, the proportionality rule ignores the possibility that, if there had been full disclosure, the insurer might well have declined the risk or, alternatively, might have altered the terms of the policy. These uncertainties, and the difficulties of proving a notional premium, constituted, in the Law Commission’s view, “a compelling case against the introduction of proportionality into our law.”<sup>19</sup>

Articles 4 to 6 of the proposed directive are very strange to English eyes. They envisage insurers stipulating for a continuing obligation to notify any new circumstances or changes affecting the risk and provide elaborate machinery for regulating the parties’ rights and duties in such circumstances. The context of these Articles is the common continental practice of long-term insurance cover extending over many years. In Britain, almost all insurance con-

<sup>18</sup> House of Lords Select Committee on the European Communities, Session 1979–80, 64th report, Insurance Contracts, H.L.(348), evidence of Mr. Peter Madge, p. 18.

<sup>19</sup> *Ibid.* para. 4.9.

tracts are renewable annually; the only long-term insurance contract is life assurance to which the directive does not apply and for which continuing adjustment of the premium would be quite inappropriate. Nor were the Law Commission impressed by the appositeness of the directive to the one type of annual contract, fire policies, where an obligation of notifying an increase of risk is sometimes to be found.<sup>20</sup>

As with the directive on consumer credit, the insurance directive is based on Article 100 of the Treaty of Rome, but it is very doubtful whether the differences in insurance contract law distort competition between insurers within the Community. British insurers maintain that the directive "would have an imperceptible and insignificant effect on competition within the Common Market."<sup>21</sup> Of far greater significance for such competition would be implementation of the so-called "services" directive which would enable insurance companies and brokers to operate freely within the Community, unhindered by national frontiers.

The proposed directive on misleading advertising, as it was originally proposed in 1978, may also be regarded as retrograde, partly because it covered "unfair" advertising as well as misleading advertising and partly because a full-blown system of legally enforceable rules would have strangled the excellent system of self-regulation governed by the Advertising Standards Authority that has grown up in Britain.

I believe it would have been retrograde to introduce legal provisions against so-called "unfair" advertising

<sup>20</sup> *Ibid.* para. 5.5.

<sup>21</sup> *Ibid.* para. 1.14.

because the broad definitions given to it were likely to inhibit competition and generate a great deal of uncertainty. Among other things the original draft said that an advertisement is deemed “unfair” if it appeals to sentiments of fear, thereby presumably inhibiting advertisements for life assurance and burglar alarms.<sup>22</sup>

Far more serious was the threat the original draft presented for our present system of self-regulatory control over advertising. Complementary to the legal controls over advertising, such as are contained in the Trade Descriptions Act, most advertising (other than on radio and television) is subject to control by the Advertising Standards Authority (A.S.A.) whose operations are financed by a 0.1 per cent. levy on display advertisements, but whose chairman and a majority of whose members are independent of the advertising industry. Their bible is the British Code of Advertising Practice, which is the most sophisticated of all the self-regulatory codes of practice and the two principal sanctions are adverse publicity—details and names are given in their monthly reports—and the withholding of advertising space until the offending advertisement is amended or withdrawn.

Implementation of the directive in its original form would have required legal rules—“adequate and effective” legal rules, the draft said—against misleading and unfair advertising and those laws would have had to provide persons affected by such advertising, and associations with a legitimate interest, with quick and inexpensive means of initiating legal proceedings to obtain redress,

<sup>22</sup> House of Lords Select Committee on the European Communities, Session 1977-78, 38th report, *Misleading Advertising*, H.L.(230), para. 11.

including orders for the cessation of the offending advertising. The draft did expressly allow for the continuation of any self-regulatory controls but, in my view, that was hardly likely to occur. When the House of Lords Select Committee on the European Communities examined the matter in 1978, it said this<sup>23</sup>:

“ . . . the Committee think that the legal system proposed in the draft directive would prove to be incompatible with and would jeopardise the continuance of the present U.K. self-regulatory system which works well. Advertisers could not be guaranteed that an adjudication from the A.S.A. offered certainty that their advertisement was in conformity with accepted standards . . . the advertising business might have little incentive to continue to fund the self-regulatory system. . . . ”

The A.S.A. system has its deficiencies. Following an Office of Fair Trading report on the self-regulatory system,<sup>24</sup> a Department of Trade Working Party published a report in 1980 which summarised the deficiencies as follows<sup>25</sup>:

- “(a) the self-regulatory arrangements do not embrace all forms of non-broadcast advertising;
- (b) in principle the A.S.A.’s sanctions can be applied effectively only in those cases where either the advertiser and/or the media subscribe to self-regulation;
- (c) self-regulation does not always permit the

<sup>23</sup> *Ibid.* para. 24.

<sup>24</sup> Review of the U.K. self-regulatory system of advertising control, a report by the Director General of Fair Trading, November 1978.

<sup>25</sup> Department of Trade, “The Self-regulatory System of Advertising Control,” Report of the Working Party, 1980, p. 7.

application of effective sanctions for dealing with those who are determined either to breach the Code or to defy a decision of the A.S.A., neither can immediate preventive action be taken against major misleading advertising abuses.”

What the Working Party proposed was that there should be a new statutory duty not to publish an advertisement likely to deceive or mislead with regard to any material fact. (Notice that no mention is made of “unfair” advertising). The duty would be enforced by the Director General of Fair Trading having power to seek from the courts an order to prevent publication of an advertisement that appeared to breach that duty. The aim would be to provide practical reinforcement of the A.S.A.’s ordinary machinery where this had been frustrated or was likely to be ineffective, for example, because the offender did not subscribe to it or was not prepared to submit to a particular ruling by it. The procedure proposed would also provide a *speedy remedy* so as to stop a misleading advertisement with minimum delay. The control system would continue to operate but the new statutory powers would give it added strength.

At the time of writing it would seem that, at least in this field, the story of the 1978 draft directive on advertising will have a happy ending. It has been drastically amended so as to allow for the British self-regulatory system, reinforced in the way proposed by the Department of Trade Working Party. Instead of having a retrograde effect it may be beneficial.

My example of a well-intentioned directive but one damaging to national initiatives is that on product liability. It is eight years since a final draft directive on this subject

was adopted by the Commission of the European Communities. There are significant differences of view between the various Governments of the Community on such matters as a "state of the art" defence, financial limits, and whether it should apply not only to personal injury but also to damage to property. It seems to me that the stalemate will continue so long as the Commission seeks to legislate for the details of a new strict liability régime to be applied uniformly throughout all the countries of the Community.

The question has to be asked as to whether the understandable desire in the EEC to resolve the issues on an EEC-wide basis is putting at risk the possibility of achieving any change at all. For some years change towards imposing a greater liability on manufacturers has been strongly advocated in Britain, and, indeed, in other countries. The Law Commissions<sup>26</sup> and the Royal Commission on Civil Liability and Compensation for Personal Injury<sup>27</sup> both reported in the late 1970s in favour of liability irrespective of fault on the part of the manufacturer. When Parliament debated the matter in November 1980, while admittedly the Government said it favoured introducing a "state of the art" defence, there was general agreement on all sides that the basic principle of liability irrespective of fault should be translated into law.

Mr. Richard Thomas, legal officer of the National Consumer Council, has said,<sup>28</sup> "it is arguable that the pros-

<sup>26</sup> Law Commissions, *Liability for Defective Products* (Law Com. No. 82 and Scot. Law Com. No. 45), Cmnd. 6831.

<sup>27</sup> Cmnd. 7054.

<sup>28</sup> Richard Thomas and Amanda Cleary, "The Impact of European Consumer Law in the U.K." *Journal of Consumer Studies and Home Economics*, December 1981.

pect, however distant, of European legislation on a given subject can effectively act as a barrier to any domestic reform," and he suggested that the climate was right for product liability reform in the United Kingdom in the immediate aftermath of the Law Commissions and Royal Commission reports in 1978-79, had it not been for the EEC directive. (The same could be said of yet another directive, that concerned with doorstep selling where Britain has long needed the same sort of "cooling-off" period for cash sales as it has for hire-purchase contracts.

Perhaps, in the not too distant future, the EEC Commission will have put aside its detailed directive and produced a new version which confines itself to the general principle of strict liability and, while requiring each Member State to legislate as soon as possible, leaves it to their discretion to decide the detailed scope and extent of the application of the strict liability.

I think there are a number of reasons for adopting this different approach. It has taken a very long time to make any progress on this issue. Already over a decade has passed since Britain first required an official study and report to be made on the subject and it is not unrealistic to contemplate the possibility that no agreement can be reached on the directive if it remains substantially as it is.

It is generally thought to be preferable that any change should be made on as wide an international basis as possible because one country's manufacturers cannot be expected to be subject to a heavier burden of legal responsibility for their products than the burden carried by their trading competitors in other countries. But that argument may *sound* stronger than it really is in practice. No evidence has been provided by the EEC Commission that competition is at present being distorted and, as the Royal

Commission pointed out, harmonisation of the legal basis of liability may have only a limited effect on relative production costs so long as such factors as the attitudes of courts and levels of damages continue to vary as between different countries. Moreover, the factors that help or hinder the competitiveness of rival companies in different countries are many and various and it is surely likely that differences arising from the imposition of technical requirements on imported goods and variations in production costs such as the price of fuel are much more significant than variations in the legal basis of liability for defective products. I may add that if there is at least harmonisation on the *principle* of strict liability, the alleged need in terms of international competition to achieve harmonisation on whether or not a "state of the art" defence should be allowed is even less significant. The EEC Commission itself says in the preamble to the draft directive that development risks are "extremely rare."

In April 1980, the House of Lords Select Committee on the European Communities reported that it was not convinced that the draft directive is *intra vires* Article 100, on which it purports to be based.<sup>29</sup> This is because the EEC Commission explicitly justifies its proposal on the basis that divergences in national legal provisions "may distort competition" and influence the free movement of goods within the Common Market. As I have already mentioned, the Commission have produced no evidence that competition is currently being distorted. Moreover, it is not clear that any differences which may exist between the national laws "directly" affect the functioning of the Com-

<sup>29</sup> House of Lords Select Committee on the European Communities, Session 1979-80, 50th report, H.L.(236), para. 10.

mon Market, as is required for directives based on Article 100.

It would be a tragedy if the lengthy pursuit of the EEC initiative in its original detailed form were responsible for the perpetuation in the various countries of the EEC of legal rules which are generally considered neither satisfactory nor just.

It is ten years since Lord Denning delivered himself of that evocative imagery about the Treaty of Rome: "(it) is like an incoming tide. It flows into the estuaries and up the rivers. It cannot be held back."<sup>30</sup> With the benefit of hindsight we may think that this view exaggerated the impact of the EEC upon domestic law. Certainly, the EEC has had only a small impact on consumer protection and it seems to me that several EEC initiatives aimed at improving the consumer's economic interests have been over-ambitious, unhelpful, and only doubtfully authorised by the harmonisation provisions of Article 100 of the Treaty of Rome.

The terms of Miss Hamlyn's bequest envisaged that the Hamlyn lecturer would help the people of the United Kingdom realise "the privileges which in law and custom they enjoy in comparison with other European peoples." This Hamlyn lecturer's view is that, in the field of consumer protection, the people of this country do enjoy many such privileges as a result of the initiatives taken by the courts, by Parliament and by various other bodies. So far at any rate, the institutions of the EEC have contributed little, and one of the most obvious reasons is that Brussels has too often sought to impose on Britain alien

<sup>30</sup> *H.P. Bulmer Ltd. v. J. Bollinger* [1974] Ch. 401, 418; [1974] 2 All E.R. 1226, 1231.

concepts (as in their initiatives on insurance and advertising) or to legislate for the harmonisation of national laws without even attempting to argue the case for harmonisation in terms of promoting greater competition within the Community.

There are now glimmerings of hope, signs that the Commission, though reluctant perhaps to give up its grander designs, is willing to compromise and recognise that national differences cannot be brushed aside.<sup>31</sup> If this is so, British consumers whose hopes and aspirations for the Community have so far been so grievously disappointed, will be glad. It can only be of benefit to the British consumer if Community institutions are seen as an alternative source of help, support and action on their behalf.

<sup>31</sup> See also G.L. Close, "The Legal Basis for the Consumer Protection Programme of the EEC and Priorities for Action," (1983) *European Law Review*, 221, 235: "When presenting a proposal the Commission must demonstrate both the opportuneness of the action proposed and the opportuneness of action at Community level. Rather careful attention should also be given to alternatives to action at this level before the latter is proposed in view of both the resistance of Member States and the blocking effect which proposals may have."



## VI. Conclusion

Any firm prediction or prophesy would be unwise. In so far as one can speculate intelligently about the future from the way things have gone in the past, then it does seem that all the options are open. Although case law has played only a small part in the very considerable developments in consumer law over the past 30 years, I think I have said enough to show that there have very recently been signs that gradual but perceptible advances by case law are possible. I have not made too much of it because the highest court in the land, the House of Lords, which could give the clearest lead, seems on the latest evidence to be reluctant to do so. In the recent case of *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners*,<sup>1</sup> to which I have already referred, Lord Scarman was forthright in criticism of the existing law on the limitation period applicable to claims arising out of defective construction work. The present law, he said, was “no matter of pride” and he went on:

<sup>1</sup> [1983] 2 A.C. 1, 19; [1982] 2 W.L.R. 6, 15.

“It must be . . . unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury (or damage). A law which produces such a result . . . is harsh and absurd.”

He added that it might be tempting to suggest that, in accordance with the Practice Statement of July 26, 1966,<sup>2</sup> the House of Lords might consider it right to depart from precedent. However, in Lord Scarman’s view, the reform needed was not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. “The true way forward,” he said, “is not by departure from precedent but by amending legislation” and, fortunately, the problem of latent damage and date of accrual of cause of action had already been referred to the Law Reform Committee.<sup>3</sup>

Now that seems to me a very reasonable statement of the limitations that exist on judicial evolution of the law. But it provokes in my mind two anxieties: (i) are the courts being too timorous and unduly reluctant to develop the law themselves?; and (ii) will Government and Parliament have the time and inclination to take up the issues left to them by the judges?

On the first question it seems that at present, at any rate, the higher courts may too readily be declining to take a hand in evolving the law. The Unfair Contract Terms Act 1977 gave the courts the task of determining whether,

<sup>2</sup> [1966] 1 W.L.R. 1234; [1966] 3 All E.R. 77.

<sup>3</sup> Mr. Alan Paterson in his book *The Law Lords* (1982) shows how the House of Lords in general and Lord Reid in particular articulated a series of criteria relating to the use of their new freedom granted by the 1966 Practice Statement. One of these was that a decision ought not to be overruled if to do so would involve a change that ought to be part of a comprehensive reform of the law because such changes are best done by legislation following on a wide survey of the whole field (pp. 156–8).

in certain circumstances, exemption clauses are “fair and reasonable.” If the Act is to be helpful in providing guidance to traders and consumers, it needs to be fleshed out by judicial decision, *i.e.* precedents, particularly from the higher courts. But in the 1983 case of *George Mitchell (Chesterhall) Ltd. v. Finney Locks Seeds Ltd.*,<sup>4</sup> Lord Bridge saw the matter somewhat differently. He seemed to think that each case will turn on its own facts and therefore should be very much a matter to be determined by the trial judge. “An appellate court,” said Lord Bridge, “should treat the original decision with the utmost respect and refrain from interference with it unless satisfied that it proceeded upon erroneous principle or was plainly and obviously wrong.” If that view is followed, there will not be much scope for the development of precedent or guidance coming out of the higher courts on which traders and consumers and their advisers can rely.

The second question relates to the assumption that legislation will with reasonable promptitude remedy the deficiencies that the courts have found. We have seen how in the 1960s and 1970s successive governments secured a considerable amount of legislation in the consumer interest. More recently, it should be noted that the Unfair Contract Terms Act 1977 and the Supply of Goods and Services Act 1982 were Private Members Bills. The Government did not take the initiative despite the fact that Law Commission proposals were on the table. The Estate Agents Act 1979 did stem immediately from a Government Bill but that was virtually the same as a Private Member’s Bill which had been introduced but lost in the previous Parliamentary session. Some Government

<sup>4</sup> [1983] 3 W.L.R. 163, 171; [1983] 2 All E.R. 737, 743.

initiatives can still be expected, for example, on insurance contracts, but the pace has changed. Legislation to further the cause of the consumer is now less readily obtainable and that may well be so even if the higher courts have spelt out the deficiencies of existing law and even if the Law Commission or the Law Reform Committee has urged legislative reform. It is I think important that the courts keep well abreast of the changing scene and make themselves fully aware of the Government's likely attitude. It is no good their throwing the ball to the Government if the Government is unlikely to catch it because the attentions of Government are elsewhere.

When the Fair Trading Bill was being considered, a scandal of some proportions had developed known as pyramid selling which resulted in many people paying out money for franchise rights that proved valueless. The opportunity was taken of the Bill being before Parliament to regulate pyramid selling schemes by inserting appropriate provisions in the Bill. It was appreciated, however, that a suitable Bill was not invariably available to deal with urgent problems and that primary legislation could not provide in advance for malpractices that might emerge in the future. Part II of the Fair Trading Act was introduced to provide for the possibility of regulating various kinds of consumer trade practices by delegated legislation. Part II of the Fair Trading Act has not been a success story. Its objectives were sound: it envisaged the possibility of dealing with novel trading abuses speedily and effectively by the making of regulations and without the need for primary legislation. Unfortunately its provisions were confined to the making of criminal offences and it was hedged around not only with requirements to establish that "a consumer trade practice" (which is closely

defined) adversely affected the “economic interests of consumers” but with a three-stage procedure for proposals to be made by the Director General of Fair Trading, a report to be made on those proposals by a specially constituted committee (the Consumer Protection Advisory Committee) and ultimately consideration and action at the discretion of the Minister. Only four sets of proposals have been made, all in the 1973–77 period, *i.e.* the first few years of the operation of the Act.<sup>5</sup> I would have liked, for example, to legislate against misdescriptions of house property which often cause potential purchasers to waste time looking at unsuitable properties but the definition of “a consumer trade practice” covered only goods and services, and not houses. Part II of the Fair Trading Act seems to be an example of a bold idea smothered by an excess of nervous caution so that the resulting provisions have inevitably been a disappointment.

I think one can venture to suggest that Parliament will remain the main source of further advances in consumer law. The pace may be slower but the broad public interest that underlies the proposals of the Law Commission, the Cork Committee, the Office of Fair Trading and others ensures that Government interest will not invariably be distracted into other concerns. The consumer cause has a substantial constituency. The rest of the 1980s are therefore likely to see some statutory improvements in the sub-

<sup>5</sup> The four proposals resulted in three sets of regulations: the Consumer Transactions (Restrictions on Statements) Order 1976, amended in 1978; the Mail Order Transactions (Information) Order 1976; and the Business Advertisements (Disclosure) Order 1977. The fourth proposal, concerning the display of prices and quotations without a clear statement that VAT is included, although supported by the Consumer Protection Advisory Committee, has not been implemented by the Government.

stantive civil law and in the enforcement of the law through, for example, a greater measure of personal liability on those who have the management of companies. It may be also that Governments philosophically inclined towards self-regulation (but aware of its weaknesses) will see advantage in underpinning self-regulation by a statutory general duty to trade fairly in consumer transactions in the way discussed earlier. Administrative controls through some sort of licensing scheme have been of value, particularly in the field of consumer credit, and may be used selectively in other fields.

But the reluctance of ministers to use the criminal law to enhance consumer protection seems likely to continue. In so far as this is based on the view that the criminal law and “the stigma” of criminal convictions are somehow inappropriate for trading malpractices, a welcome should be given to the debate initiated by Mr. David Tench and the Justice organisation because surely no one really disputes that some public control, some control other than just the possibility of civil action at the individual’s initiative is needed to deal with trading abuses. One of my own proposals for a broad legislative provision to ban misleading price comparisons, instead of trying to enforce very detailed provisions, would seem less of a novelty if it did not have to form part of our criminal law where close definition is expected.

I think we in this country have been fortunate that the British people, whose “privileges in law and custom” were in Miss Hamlyn’s mind in establishing the Hamlyn Trust, have conducted the debate about consumer law and policy in recent years in a way that has been both forthright and restrained. Miss Hamlyn would no doubt have been surprised at some of the substantial changes in substantive

and procedural rules that have occurred and may well have looked askance at some of the new institutions, including perhaps the Office of Fair Trading. But I think she would have been proud of the evolutionary way in which change has been effected. Perhaps the fact that our courts, Parliament and other bodies tend to contain both bold spirits and timorous souls and that the balance of influence between these two groups changes from time to time is a good thing, helpful in achieving gradual, balanced and sound progress rather than quicker but highly controversial change that is destined to lead to a major backlash. In the United States, the pendulum has tended to swing between highly aggressive innovatory action on the part of regulatory agencies, raising considerable resentment and opposition in business, and a situation in which, according to a former chairman of the Federal Trade Commission, the consumer movement is laid low by "the reaction and revolt of business."<sup>6</sup> The central lesson, he says, from his experience is, simply, "regulatory humility." I think that in Britain the consumer movement, and the regulatory authorities and Parliament have all had sufficient humility to avoid any excesses. The result, I believe, is a more solid foundation, one that is more widely accepted in the community, and one on which further improvements can be built.

<sup>6</sup> Michael Pertschuk, *The Rise and Pause of the Consumer Movement*, 1982, Chapter 5.



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